No. 02-295

In the
SUPREME COURT OF THE UNITED STATES

William E. Gagnon, Jr.,

Petitioner,

v.

Sprint Corporation d/b/a Sprint, Sprint Spectrum L.P.
and Sprint Spectrum Finance Corporation d/b/a Sprint PCS,

Respondents.

On Petition for Writ of Certioriari
To The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As a question of first impression, does the USERRA provide a lost wages remedy for employment discrimination against a uniformed services veteran?

2. As a question of first impression, does the USERRA provide for remedies in equity, upon a finding of liability for employment discrimination, regardless of whether monetary damages are awarded?

3. Once the court has determined that the plaintiff/veteran engaged in protected activity under the USERRA and may have incurred adverse employment consequences, is the finding of causation for a claim of retaliation exclusively left to the province of the jury?

(***Note:*** all questions relate to the Uniformed Services Employment and Reemployment Rights Act of 1994, Title 38 U.S.C. § 4301 *et seq.*, commonly referenced as "the USERRA").

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the United States court of Appeals for the Eighth Circuit, subject to any unknown or intervening changes in corporate structure for defendants/appellees. For the convenience of this Court, Petitioner has attached Sprint's, Defendants' Notice of Corporate Affiliations, filed in the United States District Court regarding this case. (App. 13).

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OPINIONS BELOW

1. William E. Gagnon, Jr. v. Sprint Corp. et al., 284 F.3d 839 (8th Cir. 2002). ***Memorandum Opinion***, Case No. 01-2505, filed March 19, 2002, attached at App. 1.

2. Gagnon v. Sprint Corp., (8th Cir.), Case No. 01-2505, ***Order Denying Petition for Rehearing and or Rehearing En Banc***, filed May 22, 2002, attached at App. 2.

3. Gagnon v. Sprint Corp., Case No. 99-0683-CV-W-1, United States Court for the Western District of Missouri Western Division, ***Order***, filed January 4, 2001, (trial court's order denying plaintiff, Gagnon's, Motion for Summary Judgement and granting defendants, Sprint's, Partial Motion for Summary Judgement). Attached at App. 3.

4. Gagnon v. Sprint Corp., Case No. 99-0683-CV-W-1, USDC W.D. Mo., ***Order***, filed May 10, 2001, (trial court's order granting defendants' Motion to Dismiss and entering Judgement as a Matter of Law). Attached at App. 4.

5. Gagnon v. Sprint Corp., Case No. 99-0683-CV-W--1, USDC W.D. Mo., ***Order***, filed February 4, 2002, (trial court's order for Gagnon to pay Sprint its attorneys' fees and costs). Attached at App. 5.

6. Gagnon v. Sprint Corp., Case No. 99-0683-CV-W-1, USDC W.D. Mo., ***Order***, filed July 15, 2002, (trial court's order vacating the court's prior award of attorneys' fees and costs to Sprint, due to Eighth Circuit reversal). Attached at App. 6.

JURISDICTION

This is a Petition for Writ of Certiorari, submitted in accordance with Supreme Court Rule 10 and pursuant to this Court's jurisdiction under Title 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Eighth Circuit issued its Opinion in, Gagnon v. Sprint Corp., 284 F.3d 839, on March 19, 2002. Both Appellant and Appellees submitted separate Petitions for Rehearing. The Eighth Circuit Court requested responsive briefs from the opposing parties on both Petitions. On May 22, 2002, the Eighth Circuit Court issued its Order Denying Petition for Rehearing and for Rehearing En Banc. This Petition for Writ of Certiorari is filed within ninety days of the issuance of the Eighth Circuit's Order on May 22, 2002, in compliance with Supreme Court Rule 13.3.

This Petition for Writ of Certiorari arises directly out of the interpretation and application of a federal statute, (the USERRA, Title 38 U.S.C. § 4301 *et seq.*), as a matter of federal question jurisdiction, Title 28 U.S.C. § 1331.

STATUTORY PROVISIONS

(Text of referenced statutes attached at App. 7; and excerpts of relevant Congressional Record at App. 8 and 9)

The Uniformed Services Employment and Reemployment Rights Act of 1994
"USERRA" Title 38 U.S.C. § 4301, *et seq.*

Sec. 4301. Purposes; sense of Congress

Sec. 4303. Definitions

Sec. 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

Sec. 4323. Enforcement of rights with respect to a State or private employer

STATEMENT OF THE CASE

A. Procedural Background

Petitioner, Gagnon's, case arises out of two sets of federal statutes protecting individuals against employment discrimination; USERRA, for veterans' protection; and the Civil Rights Act of 1964, Title 42 U.S.C. 2000e, for reverse discrimination as a white male, ("Title VII").

Prior to trial, Gagnon filed a motion for summary judgement, based upon direct evidence, for both his claims under USERRA and Title VII, and, Sprint filed a partial motion for summary judgement, seeking dismissal of the USERRA claims. The trial court denied Gagnon's motion, and granted Sprint's motion dismissing the USERRA claims. (App. 3).

Trial commenced on the Title VII claims. At the end of Gagnon's case, the trial court granted Sprint's motion for a judgement as a matter of law. (App.4). The trial court held this was not a direct evidence case.

Gagnon appealed both the USERRA and Title VII dismissals to the Eighth Circuit Court of Appeals. The Eighth Circuit reversed the trial court on the Title VII issues and held that, as a matter of law, Gagnon had submitted a direct evidence case and prevails on the issue of liability. The case was remanded on the issue of damages and Sprint's affirmative defenses to damages. (App. 1).

Further, the Eighth Circuit upheld the trial court on the dismissal of the USERRA claims. However, in doing so, the court held in favor of Gagnon on the legal standards at issue, but, *sua sponte*, held that the USERRA did not provide a wage-based damage for Gagnon; therefore, regardless of direct evidence of veterans' discrimination, Gagnon's USERRA claim was moot.

B. Facts

On January 31, 1997, Gagnon retired from the United States Army after serving more than 21 years. He retired as a Lieutenant Colonel. (Tr. 449, App. 11). For over thirteen years, his military duties involved administering and developing training management programs, including sophisticated computer-based training ("CBT"). (P's Ex. 267, App.12).

Sprint PCS hired Gagnon in March 1997 in a non-management capacity, with the stated anticipation that he was needed to fill a new position in management for CBT operations. (Tr. 448-455, App. 11). In October 1997, Gagnon was hired in the Training and Performance Support Department ("TAPS") as CBT-Manager.

Gagnon's management position was evaluated for compensation. The recommended salary had a market reference point ("MRP") of $66,000. Sprint's policy and procedure was to hire a

person within 15% of the recommended MRP. (P's Ex. 131, Tr. 821-24, 841, App. 12, 11). The acting director of TAPS, Lynn Meredith-Ball, recommended Gagnon's salary at 100% of the MRP. (Tr. 249, App. 11). The Human Resources Department recommended his salary at 85% of MRP, or the low end of the 15% of MRP policy. (Tr. 833-34, App. 11).

Meredith-Ball submitted the salary paperwork to Jim Mendenhall, as the Sprint Vice-President. Mendenhall said he was not going to approve either recommendation, stating, "I'm not going to pay him that, he's a white guy, isn't he? . . .If he were a woman or a minority, I would have to pay him, but I don't have to pay him." (Tr. 252-54, App. 11).

In the meantime, additional evidence of veterans' discrimination was developed, including discrimination directed at Gagnon. In October 1997, a member of management interviewed two job applicants with military backgrounds and stated:

> I provided my notes regarding the two candidates I interviewed yesterday in a previous e-mail. The following is a list of things to think about. Both candidates are career military. Both have worked or currently work for the same company, Logicon, so have very similar backgrounds as far as type of experience since leaving the military. I believe Bill Gagnon has also worked for the same organization. That would make three people with the same basic background in the training organization. Diversity is critical for an organization to grow and thrive. Different skill sets, different backgrounds and experiences are essential in a well-rounded training organization. The organization should reflect the environment in which it is providing training. Hope this helps. Thanks.

(Tr. 228-30, P's Ex. 16, App. 11, 12). Meredith-Ball reported that such practice and comments could create discrimination. Meredith-Ball was then verbally reprimanded for her report and statements. (Tr. 230-34, App.11).

Regarding Gagnon's initial salary as a CBT-manager, Gagnon had the highest MRP ranking and was paid $10,000 less than the next closest manager in the Kansas City, TAPS department. (P's

Ex. 270, App. 12). Because Gagnon was not confident that his salary would be corrected, he filed an EEOC Charge of Discrimination for reverse discrimination in April 1998. (Tr. 477, App. 11).

In a manager's meeting on June 22, 1998, Kathleen Wilder, Director TAPS, stated there was a perception in the department that you had to be retired military to advance, together with the perception of unfair treatment. Further, Wilder admitted she was uncomfortable that some of her employees thought they were being treated differently because they were not military and Wilder personally told Gagnon that she was uncomfortable with the number of former military people in TAPS. (Tr. 312-13, 602, App. 11).

In late June or early July 1998, Gagnon told Wilder that he was planning on transferring from TAPS to another department within the Sprint organization. (Tr. 480, App. 11). On August 7, 1998, Meredith-Ball learned of potential positions that were opening up in another department and a group of employees, including Gagnon, discussed this information. (Tr. 306-13, App. 11).

On August 27, 1998, Gagnon was disciplined, by the issuance of a "written reminder." The discipline specifically prohibited Gagnon from obtaining a transfer or promotion without special approval. (P's Ex. 34, App. 12). The reminder also stated that in the August 7, 1998 discussion Gagnon had created the false perception that discrimination was occurring in the workplace and falsely stated that Wilder was uncomfortable with the number of former military people in TAPS. Gagnon denies having made such statements. (Tr. 494-95, App. 11).

In the meantime, Sprint's in-house counsel, Ellen Martin, responded to the EEOC on Gagnon's Title VII Charge. Sprint stated that Gagnon was not discriminated against because he was a white, male, because his lower salary was due to his experience being in the military:

> Gagnon's performance was acceptable in that he met or exceeded his supervisor's expectations and the objectives established for his position. While Gagnon is a valued employee, he did not have all of the necessary technical expertise for the management position to which he was promoted until the Company paid for his training. Nor did Gagnon have the same level of relevant or industry-related experience. As demonstrated by Gagnon's resume, the majority of his experience before Sprint PCS was in the military; his counterparts had extensive training experience within corporations.

(P's Ex. 95, p. 8, App. 12).

Wilder admits she did not know, nor did she inquire, regarding the depth and scope of Gagnon's prior CBT experience. (Tr. 666, App. 11).

Wilder refused to allow Gagnon to apply for transfers during the six-month, disciplinary probation, while others were allowed to apply for transfers and received such transfers or promotions. (Tr. 496, 688-90, App. 11). Eventually, Gagnon applied for approximately twenty different positions within Sprint and was not hired. (P's Ex. 268 (App. 12), refused by trial court, Tr. 514-16, App. 11).

Gagnon believes that he sufficiently presented a set of claims for discrimination and retaliation under the USERRA. Further, it appears that the Eighth Circuit believes direct evidence of USERRA discrimination exits. However, the Eighth Circuit, *sua sponte*, provided a statutory interpretation allowing the dismissal of Gagnon's USERRA claims on the premise that he did not have a damage remedy for lost wages. Gagnon believes this interpretation of federal law by the Eighth Circuit is in error and creates an important issue of public policy for this Court to address, as a matter of first impression, regarding the scope of remedies under the USERRA.

REASONS FOR GRANTING THE WRIT

I. This Case Raises Important Questions of Federal Law, as a Matter of First Impression, for the Protection of Military Veterans in Employment

This is a case of first impression under the USERRA. The Eighth Circuit opinion at issue effectively strips military veterans with any protection against employment discrimination. Only review by this Court will assist in resolving the statutory, remedial scheme of this federal law.

Historically, Congress has tended to provide amendments to the military veterans' protection laws following a major military campaign. These amendments address contemporaneous issues of added protections. This was true following the Gulf War with the passage of the USERRA in 1994.

The USERRA, for the first time, provided, in part, for a private cause of action for employment discrimination based upon the protected status of having served in the uniformed services of the United States of America.

Congress granted remedies for economic damage, monetary liquidated damages, in equity, attorneys' fees and costs of litigation, and waivers of fees and costs. Title 38 U.S.C. § 4323. (The remedial scheme is more similar to the Age Discrimination in Employment Act, Title 29 U.S.C. § 621 *et seq*., as opposed to the Civil Rights Act of 1991, Title 42 U.S.C. § 1981a).

In this case, the Eighth Circuit Court, *sua sponte*, upheld the dismissal of the USERRA claims based upon a legal theory that a military veteran is without a monetary damage remedy under USERRA, even when direct evidence of veterans' discrimination exists. This theory was not raised by any party or the trial court, nor was it briefed by either party. Additionally (1) the holding is in direct conflict with the remedial scheme stated in the statute; (2) the holding ignores Petitioner's specific plea for equitable relief; and, (3) is generally in conflict with this Court's prior holdings that

veterans' protection laws are to be given liberal reading to provide the broad protections for our veterans as intended by Congress.

Given the reality of current military actions involving the United States Armed Forces, it is more than reasonable to presume that USERRA will be invoked by military veterans in the immediate future, when employment discrimination arises based upon an individual's military status.

Leaving the Eighth Circuit Court's holding intact, without review by this Court, will only lead to significant confusion on the scope of remedies available to veterans discriminated against.

II. The Language of the USERRA and the Legislative Record Indicate That the Term "Benefit of Employment" Provides a Monetary Damage Remedy (i.e., Lost Wages) for Victims of Veterans Discrimination Such As Gagnon

Discrimination under the USERRA is established under the framework laid out in § 4311(a):

> "A person who is a member of...[or] has performed...in a uniformed service shall not be denied initial employment, reeeployment, retention in employment, promotion or any benefit of employment by an employer on the basis of that membership...."

Ruling *sua sponte*, the Eighth Circuit held that Gagnon could not seek a remedy for lost wages under the USERRA, and, therefore, he is without a claim – even if he was discriminated against. The Eighth Circuit ruled that the term "benefit," as defined by the USERRA, specifically excludes wages or salary for work performed. 38 U.S.C. § 4303(2)[1]; see Gagnon v. Sprint Corp., 284 F.3d 839, 853 (8th Cir. 2002).

Gagnon asserts the Eighth Circuit misinterpreted the remedial scheme of the federal law, available to military veterans, who are subject to employment discrimination.

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[1]Section 4303(2) states in pertinent part: "The term 'benefit,' 'benefit of employment,' or 'rights and benefits' means any advantage, profit, privilege, gain, status, account or interest (other than wages or salary for work performed)..."

The USERRA remedial scheme is spelled out at § 4323(d), (e) and (h):

> **(d) Remedies.**–(1) In any action under this section, the court may award relief as follows:
>
> (A) The court may require the employer to comply with the provisions of this chapter.
>
> (B) The court may require the employer to compensate the person for any loss of wages **or** benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
>
> (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages; if the court determines that the employer's failure to comply with the provisions of the chapter was willful.
>
> (2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.
>
> . . . . .
>
> **(e) Equity powers.**–The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.
>
> . . . . .
>
> **(h) Fees, court costs.**–(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.
>
> (2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(Emphasis added). The clear reading of the remedial section of the USERRA should be sufficient, standing alone, to establish the need to review the Eighth Circuit opinion upon a writ of certiorari, to determine the remedial scope of the USERRA.

Further, as remedial legislation, the USERRA is to be "interpreted liberally," and , "broadly construed." H.R. Req. No. 103-65, at 19, 23 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2452, 2456 ("the act is to be liberally construed"). Echoing the legislative record, and as a matter of strong public policy, this Court has specifically held that the veteran's protection laws are to be "broadly" interpreted and "liberally construed." See Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977); McKinney v. Missouri - K.-T.-R. Co., 357 U.S. 265, 270 (1957); Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U.S. 275, 285 (1946). The USERRA, and more specifically the scope of the term "benefit of employment," must therefore be interpreted to provide Gagnon a remedy in accordance with the fundamental principle of statutory interpretation that remedial legislation be given a "liberal construction to effectuate its statutory purpose." See Hull Co. v. Hauser's Foods, Inc. 924 F.2d 777, 782 (8th Cir. 1991). That purpose is to protect veterans from employment discrimination and to provide monetary and remedial relief if discrimination occurs. Otherwise, to interpret the USERRA any less broadly circumvents its remedial scheme. See Boys Mkts. v. Retail Clerks Union Local 770, 393 U.S. 235, 250, 90 S. Ct. 1583, 1592, 26 L.Ed.2d 199, 210 (1970) ("[s]tatutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of the pertinent law and the policies that inspired ostensibly inconsistent provisions").

The starting point for interpreting a statute is its plain language, which should be conclusive absent contrary legislative intent. See Kaiser Aluminum and Chem Corp. v. Bonjorno, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575, 108 L.Ed.2d 842, 852 (1990) (emphasis added). In other words, if the statute's legislative history contradicts its alleged plain meaning, the plain meaning does not control. See United States v. Stewart, 104 F.3d 1377, 1388 (D.C. Cir. 1997) ("while plain language of statute is an important guide, manifest intent prevails over the letter") (quoting In Re Nofgiger,

925 F.2d 428, 434 (D.C. Cir. 1991)). The remedial provision, § 4323(d), specifically provides a remedy for, "any loss of wages or benefits. . . ." Regardless of any definition of "benefits," under § 4303(2), the statute states a remedy for "any loss of wages." Beyond that clear reading, the legislative intent still shows the error in the Eighth Circuit's, *sua sponte*, interpretation.

Specifically, the official United States Senate Report No. 103-158, (See 1993 WL 4325676, p. 38 (Leg. Hist.)), defines the parenthetical clause at issue in § 4303(2) and describes its meaning as follows:

> "other than wages or salary for work **not performed** while absent from employment"

As stated by the same Congress that drafted the legislation at issue, the parenthetical language is simply an indication that while various benefits continue to accrue during leave periods, the employer is not obligated to pay the wages or salaries of a potentially aggrieved employee for unworked hours while on military leave status (whereas a claimant is entitled to monetary damages for discrimination arising from work he or she did perform). The Senate Report accurately states the explanation of the definition, without any uncertainty, because it is preceded with the actual language of the statute and is raised as an interpretive comment, not as an amendment.

The combined House Report No. 103-65, which also addresses the USERRA currently in place (See Cong. Record Vol. 139 (1993) and Cong. Record Vol. 140 (1994), excerpts, App. 9), likewise calls for the inclusion of wages and salaries in the remedial scheme of the USERRA. Clarifying its intent as to § 4311, (the underlying and primary provision establishing the framework for USERRA discrimination claims), House Report No. 103-65 explains that a monetary remedy exists if an USERRA discrimination claim is established:

"If the employee is unlawfully discharged under the terms of this section prior to leaving the military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, and processing of the claim should not wait completion of the service, even if only for lost wages."

"Section 4322(d)(2) provides that the courts are empowered to require employers to comply with the provisions of this chapter, to compensate the employee for any loss of wages or benefits, and to award monetary damages in the case of willful violations." *(Note: § 4322 became § 4323 in the final version of the Statute.)*

Cong. Record, p. 2471, P.L. 103-353, p. 38.

* * * * *

"To the same effect, the payment of back wages or lost benefits, by itself, does not constitute prejudice in the laches context....In terms of the monetary remedies awarded under chapter 43, the principal that lost wages or other benefits lost because of violations of chapter 43 are to be calculated on a pay period by pay period basis is hereby affirmed, [*citations omitted*], which hold that a veteran or reservist does not waive his or her rights under the act by refusing an offer of redeployment which extends anything less than full statutory guarantees, including proper seniority, position, pay and lost wages and benefits."

Cong. Record, p. 2472, House Report No. 103-65, p. 39.

* * * * *

"Current law, under Section 4302, in the case of a private or state employer who fails or refuses to comply with the re-employment laws [USERRA], (1) the District Court of the United States for the district in which the employer maintains a place of business, exercises authority or carries out its function, has the power, upon the filing of a motion, petition, or other appropriate pleading by the individual entitled to the benefits of the re-employment law and to compensate the individual for any loss of wages or benefits suffered by reason of the employer's unlawful action;....(8) if the District Court determines

> that the employer's failure to comply with the provisions of Chapter 43 were willful, the court may require the state or private employer to pay, in addition to the compensation determined to be paid the person, an amount equal to that compensation as liquidated damages." (emphasis added)

Cong. Record, p. 2508, P.L. 103-353, Explanatory Statement, Enforcement.

* * * * *

> [Federal government as employer]...to issue an order requiring compliance and to compensate the individual for any loss of salary or wages suffered by reason of failure to comply plus any amounts received by the individual through other employment."

Cong. Record, p. 2509, Explanatory Statement.

Denying Gagnon the ability to obtain monetary relief for lost wages and salary as a victim of USERRA discrimination undermines the USERRA's purpose to provide relief for such unlawful, discriminatory conduct. See Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286, 133 L.Ed.2d. 258 (1995) (elementary rule of construction that act cannot be held to destroy itself); In Re Windsor on the River Assoc. Ltd., 7 F.3d 127, 130 (8th Cir. 1993) (task of federal courts is to interpret statute in light of purposes Congress sought to serve.)

Further, as a matter of public policy, the Eighth Circuit's opinion has the effect of giving employers *carte blanche* to discriminate against a military veteran without fear of economic reprisal.

In briefs on Petition for Rehearing, Sprint argued that USERRA's legislative history from 1991 corroborates the exclusion of wages for work performed under the definition of "benefit of employment." However, such legislative history predates the Congressional record of the governing legislation. More importantly, the 1993 and 1994 House and Senate Reports relied upon by Gagnon encapsulate the Congressional intent for the current version of the USERRA, and for that reason, best represent the legislative intent for the remedial scheme at issue. See United States v. Vig, 167

F.3d 443, 448 (8th Cir. 1999) (it is the intent of the Congress that enacted the section that controls for purposes of statutory construction).

Petitioner suggests the specific, remedial language of the statute, along with the legislative record, clearly demonstrate that veterans, who suffer discrimination on the job, are entitled tc monetary damages under the USERRA in the form of lost wages and salary. Review of the remedial scope of the USERRA, by this Court, will appropriately advance public policy needs to define the scope of protection afforded our military veterans.

III. The USERRA Expressly Provides for Equitable Relief Regardless of the Award of Any Monetary Damages for Lost Wages.

The broad and comprehensive, equitable remedies a court may utilize, upon a finding of USERRA discrimination, are set forth in §§ 4323 (d) (1)(A) and (e).

The trial court, inherently, has the ability to issue equitable remedies upon a finding of discrimination under the USERRA.

However, in this case, Gagnon specifically requested equitable relief under § 4323. Gagnon's Complaint made the following prayer, in part, in the first count alleging veteran's discrimination:

> WHEREFORE, Plaintiff prays the Court:
>
> (d) Order Defendants to comply with the Veteran's Rights Act as to Plaintiff and other employees and prospective employees; develop a written compliance program subject to court approval which includes, but is not limited to, policy revisions, training programs, affirmative action and recruiting, a retraining program for veterans to gain specific telecommunications workplace skills consistent with the veteran's skills and background, public postings in the

workplace of non-compliance violations and strategies to provide compliance, provide for a veteran's liaison who shall report to the Court, provide policies and actions to appropriately deal with employees and representatives of Defendants who engage or have engaged in discriminatory conduct, and to provide notice to the United States government and each office of the United States Armed Forced notifying them of the non-compliance and advising of the strategies to provide compliance.

(f) Grant such affirmative or equitable relief as the Court may deem just and proper.

(See App. 10).

Direct evidence supports Gagnon's claim of USERRA discrimination. Upon such a showing, liability is established. Gagnon should be afforded equitable relief, regardless of monetary damages.

Kathleen Wilder's written statement to in-house counsel stated:

> **He [Gagnon] was brought in about $1,000 less[2] than his peers based upon the lack of business experience. Most of his experience was in the military and his counterparts had extensive training within corporations.** (P's Ex. 4).

Sprint's EEOC response to Gagnon's Title VII EEOC Charge of Discrimination states Gagnon was paid less, **because** he is a military veteran:

> **"Nor did Gagnon have the same level of relevant or industry related experience. As demonstrated by Gagnon's resume, the majority of his experience before Sprint PCS was in the military; his counterparts have extensive training experience within corporations."** (P's Ex. 95; Tr. 638, App.12, 11).

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[2] Wilder's personally drafted statement reads $1,000. (P's Ex. 4, App. 12). This, however, is a typographical error. P's Ex. 270, Tr. 661, App. 12, 11, shows Gagnon's pay was actually $10,000 less than the next, closest peer. Further, Wilder admitted she did not know the scope of Gagnon's CBT experience or skills in the military or compared to any other person. (Tr. 666, App. 11).

Thus, Sprint's proffered, "same decision" defense to the Title VII claim was a direct acknowledgment of veteran's discrimination against Gagnon.[3] For the courts to allow Sprint to defend itself against one claim of discrimination, based upon an admission of another, co-existing, act of discrimination (without remedy) turns justice and the employment discrimination laws on their heads.

Apparently recognizing the direct evidence of USERRA discrimination, the Eighth Circuit ruling completely overlooked the need for the courts to implement equitable relief for the underlying purpose of the anti-discrimination laws – to eliminate illegal discrimination in the workplace.

The scope of equitable remedies, under the USERRA, also raises an important interpretation of federal law for this Court to review upon a writ of certiorari.

IV. A Jury Must Determine Whether Gagnon Has Sufficiently Established Causation to Entitle Him to Relief for USERRA Retaliation.

The Eighth Circuit ruling reversed the trial court, finding that Gagnon had not violated any Sprint policies, and that Gagnon had properly raised his complaints of retaliation and engaged in protected activity under the USERRA.

Nonetheless, the Eighth Circuit still upheld the district court's grant of summary judgment on the USERRA retaliation claim, concluding that Gagnon failed to establish causation:

---

[3] Offering Gagnon's military background as a defense to paying Gagnon a lower starting salary as CBT manager (which prompted Gagnon's April, 1998 EEOC charge of Title VII discrimination) is akin to the following response to allegations of gender discrimination – "The lower salary wasn't because she was a female, it was because she was Jewish." See P's Ex. 4 and 95, App. 12.

> "Our review of the records suggests that there is no evidence connecting Gagnon's internal complaints of discrimination and the issuance of the written reminder following the meeting held outside of the department by Gagnon and Meredith-Ball.

See Gagnon, 284 F.3d at 855.

The causation evidence proffered by Gagnon gives rise to conflicting inferences sufficient to raise material fact issues necessitating resolution by a jury. See Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 120 Sup. Ct. 2097, 2110 (2000) (credibility determinations, weighing of evidence, drawing of legitimate inferences "are jury functions, not those of a judge"); Ryther v. KARE 11, 108 F.3d 832, 845 (8th Cir. 1997) (where conflicting inferences reasonably can be drawn from the evidence, it is the function of the jury to determine what inferences shall be drawn); Dace v. ACS Indus, Inc., 722 F.2d 374, 377 (8th Cir. 1983) ("When questions of fact are involved, common sense is usually more important than technical knowledge, and 12 heads are better than one.")

As determined by the Eighth Circuit in this case, the appropriate standard of proof for an USERRA retaliation claim is the so called "but for" test, and the burden of proof is on the employer once the employee's case is established. See Gagnon, 248 F.3d at 853 (citing Sheehan v. Dept. of Navy, 240 F.3d 1009, 1013 (Fed. Ct. 2001)). As the Eighth Circuit further clarified, the procedural framework and evidentiary burdens laid out in the USERRA shift the burdens of persuasion and production to the employer if the plaintiff shows that his or her military status was at least a motivating factor in the employer's action. See Gagnon, 284 F.3d at 854 If the plaintiff makes such a showing, the employer prevails only if it proves by a preponderance of the evidence that the challenged action would have been taken despite the veteran's protected status. Id.

"Motivating factor" means that if the employer was asked at the moment of the decision what its reasons were for the challenged decision and it gave a truthful response, **one** of those reasons would be the employee's military position or related obligations. See Robinson v. Morse Chevrolet-Buick, Inc., 974 F. Supp. 571, 578 (E.D. Tex. 1997) (emphasis added) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250, 109 Sup. Ct. 1775, 1790, 104 L.Ed. 2d 268 (1989) (the motivating factor need be only one reason for the challenged decision; not the sole "true," or "principal" reason.) Accordingly, to create a material issue of disputed fact as to causation, Gagnon need only present evidence giving rise to the reasonable inference that Gagnon's veteran's status was at least one of the reasons for the alleged retaliatory acts committed by Sprint.

The Eighth Circuit held that Gagnon engaged in protected activity under the USERRA. Further, the Eighth Circuit determined that the written reminder, "may constitute an adverse employment action," (See Gagnon, 284 F.3d at 855). Additional, uncontroverted facts give rise to numerous inferences which create material issues of fact regarding causation that must be determined by a jury. It was undisputed that Wilder previously knew Gagnon was seeking transfer, that Gagnon made transfer requests while the written reminder was in effect and thereafter, and Sprint denied every request. (Tr. 508-09, P's Ex. 50, App. 11, 12.) The fact that the written reminder was placed in Gagnon's personnel file at the disposal of Sprint hiring managers raises a reasonable inference as to Sprint's retaliatory motive behind the transfer denials. Even Sherry Gilligan, (the Vice-President, who Sprint holds out as the decision maker on whether Gagnon was retaliated against), testified she had hired, "hundreds of people within the Sprint organization," and knowing an applicant was on corrective action would negatively influence her hiring decision. (Tr. 988, 990, App. 11). In fact, Gilligan never hired anybody that had been on corrective action for

alleged work-related misconduct. (Tr. 990, App. 11). The fact that other employees were given transfers out of the CBT department, some of which had been with Sprint less than a year, in contrast to its alleged policy disallowing such transfers, bolsters the inference of a causal link between Gagnon's complaints of veterans' discrimination and the issuance of the written reminder. See Gagnon, 284 F.3d at 851 ("Papering" an employee's file with negative reports and reprimands may sufficiently support a claim of retaliation if they adversely affect or undermine an employee's position.") (quoting Kim v. Nash Finch Co., 123 F.3d 1046, 1060 (8th Cir. 1997)).

The disciplinary action of the written reminder is specifically directed at Gagnon's reported concerns of USERRA discrimination, and directly establishes the causal connection between his reporting of USERRA discrimination and the retaliatory events. At a minimum, and all that need be established to avoid summary judgment, a reasonable jury could infer that Sprint issued Gagnon the written reminder for his complaints of veteran's discrimination. Gagnon complained, and Sprint subsequently punished him for such complaints with a retaliatory motive, as illustrated by the written reminder itself:

> "You have created a false perception that discrimination is occurring in the workplace. Not only do your actions put the company at risk for something that is absolutely not true...."

Viewing the evidence as to causation in a light most favorable to Gagnon demonstrates that the inconsistent inferences arising from the conflicting evidence demands resolution by a jury. See Thorne v. Welk Inv., Inc., 197 F.3d 1205, 1211 (8th Cir. 1999) (when evidence presents "inconsistent inferences", resolution of "conflicting evidence was a matter for the jury to resolve").

Sprint did not investigate Gagnon's complaints of veterans' discrimination. This fact, alone, creates a reasonable inference for a jury to consider. Sprint was without complete and accurate

information to back up the statement in the written reminder that Gagnon's discrimination complaints were "absolutely not true". If Sprint conducted no investigation into alleged veterans discrimination, how could it conclude Gagnon had created the "false perception that discrimination is occurring in the work place"? A reasonable jury could infer that the written reminder was issued for retaliatory reasons.

This case presents the issue of first impression for this Court to establish the standards for a retaliation claim under the USERRA.

Dated: 8/20/02

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed by first-class United State mail, postage prepaid, this 20th day of August, 2002, to:

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Dennis E. Egan

No. 12-295

(2)

In the
SUPREME COURT OF THE UNITED STATES

William E. Gagnon, Jr.,

Petitioner,

v.

Sprint Corporation d/b/a Sprint, Sprint Spectrum L.P.
and Sprint Spectrum Finance Corporation d/b/a Sprint PCS,

Respondents.

On Petition for Writ of Certioriari
To The United States Court of Appeals
For the Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME I

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-2505

William E. Gagnon, Jr.,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the United States
	*	District Court for the Western
Sprint Corporation, doing business	*	District of Missouri.
as Sprint Spectrum Finance	*	
Corporation, doing business as	*	
Sprint PCS,	*	
	*	
Appellees.	*	

Submitted: December 13, 2001

Filed: March 19, 2002

Before MORRIS SHEPPARD ARNOLD, BEAM, RILEY, Circuit Judges.

BEAM, Circuit Judge.

William Gagnon brought this reverse race discrimination and retaliation case under Title VII, 42 U.S.C. § 2000e et seq., the Missouri Human Rights Act ("MHRA"), and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Gagnon appeals the district court's issuance of judgment as a matter of law ("JAML") at the close of plaintiff's case in favor of Sprint PCS on his discrimination and retaliation claims under Title VII and the MHRA. Gagnon also

appeals the district court's grant of summary judgment in favor of Sprint PCS on his USERRA discrimination and retaliation claims[1]. Upon a de novo review of the record, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

On January 31, 1997, Gagnon retired from the United States Army as a Lieutenant Colonel after serving more than twenty-one years. Gagnon then worked at Cubic Applications, Inc. ("Cubic"), a defense contractor. He was in Cubic's employ for three months prior to becoming associated with Sprint PCS.

Gagnon began working for Sprint PCS in March 1997. Sprint PCS hired Gagnon as a curriculum developer in it's training department ("TAPS") at a starting salary of $44,100 with a short-term incentive potential ("STI") of $3,000. Gagnon was directly supervised by Kathleen Wilder, the director of the department, from his initial starting date in March until his promotion. Gagnon was promoted in October 1997 to CBT-Manager, a new management position in the department. At the time of Gagnon's promotion, Wilder was out of the office on maternity leave and Jim Keenan, the department manager, and Lynn Meredith-Ball, another manager in Wilder's department, assumed Wilder's responsibilities as director of the training group. In Wilder's absence, Vice-President Jim Mendenhall was instrumental in promoting Gagnon to the manager position.

---

[1]We also note that there are two pending motions taken with the case. Appellant's Motion for Judicial Reassignment is denied. We do not question Judge Whipple's impartiality in this matter and find nothing in the record to otherwise suggest that he conducted the proceedings unfairly. Appellant's Motion for Waiver of Costs is granted pursuant to 38 U.S.C. § 4323(h).

Because Gagnon's position was new at Sprint PCS, it did not have a dollar figure assigned for compensation. Therefore, Gagnon submitted a job description for the position, with the assistance of Meredith-Ball, to the Human Resources Department ("HR") so that a compensation amount could be assigned. The Sprint PCS compensation group within HR established a market reference point ("MRP") of $66,000 with a STI of $9,500. The MRP is not a guaranteed salary point, but rather a targeted reference point for a tenured employee in that position.

As a matter of procedure at Sprint PCS, when a salary increase greater than ten percent is sought, a Compensation Exception Request form stating the amount of the raise requested is completed, sent to HR for a recommendation, then forwarded to a vice president in charge of the department for a recommendation. Then, finally the appropriate chief officer or his designee reviews all recommendations and makes final decisions on salary increases. In conjunction with Gagnon's promotion, Meredith-Ball prepared a Compensation Request Form to raise Gagnon's salary from $44,100 to $66,000, reflecting the full MRP established by the compensation group. HR did not support Meredith-Ball's proposed raise to the full $66,000 but instead proposed a salary at eighty-five percent of MRP, the equivalent of a twenty-five percent raise for Gagnon. Meredith-Ball and Julie Moylan, the HR Compensation Manager, signed the proposed compensation form on October 1, 1997. At that time, the form reflected Meredith-Ball's request for a base salary increase to $66,000 and Moylan's recommended twenty-five percent increase. Meredith-Ball submitted the request with both proposals to Vice-President Mendenhall for his approval. Mendenhall rejected both proposals on the compensation exception request form.

Mendenhall's rejection of the initial compensation request is an important part of Gagnon's claim of discrimination. According to trial testimony, Mendenhall looked at the document with the attachments and threw it back across his desk at Meredith-Ball stating, "I'm not going to pay him that, he's a white guy, isn't he?" Mendenhall further allegedly stated, "If he were a woman or a minority, I would have

to pay him, but I don't have to pay him." Meredith-Ball recalls Mendenhall refusing to discuss his stated position and clearly stating, "I'm not going to pay him. He's just a white guy." Mendenhall also stated, "That's absurd. Nobody gets more than ten percent."

After failing to obtain approval of either the full $66,000 salary for Gagnon or the proposed twenty-five percent increase recommended by Moylan, Meredith-Ball revised the compensation form to request an eleven percent raise followed by an automatic ten percent raise in six months. HR approved the eleven percent raise but did not endorse the automatic ten percent raise in six months, suggesting that Gagnon seek a ten percent raise in six months, dependent on his performance. Meredith-Ball took the revised compensation request form to Mendenhall who approved Meredith-Ball's recommendation in its entirety, including the automatic raise in six months. The form was then presented to Al Kurtze, the chief operating officer. Kurtze had the final vote on this compensation decision. Kurtze agreed with HR's recommendation and approved only the immediate eleven percent raise, with the suggestion that the automatic increase in six months be processed with separate approval action.

Gagnon filed a claim with the Equal Employment Opportunity Commission ("EEOC") in April 1998 because he was dissatisfied with his compensation increases. Gagnon claims his workplace environment deteriorated after he filed his EEOC claim and it became difficult for him to timely complete work tasks because Wilder stopped seeking his advice and stopped discussing department issues with him.

In August 1998, Gagnon and Meredith-Ball organized a discussion with four other Sprint PCS employees outside the training department building. Gagnon and Meredith-Ball informed the group of employees, all of whom possessed prior military experience, of Sprint PCS's growth outside Wilder's department. During that discussion, various statements indicated (although all parties are not in agreement) that Gagnon and Meredith-Ball advised the four employees that Wilder was uncomfortable

with the number of employees in her department with prior military experience and, therefore, would not promote anyone with such a background. However, the record also reflects that during a managers' meeting two months prior, Wilder stated there was a perception among some employees in the department that employees *had* to be retired military to advance. Gagnon responded at the managers' meeting that the perception was not true. Wilder also admitted at this managers' meeting that she was uncomfortable that some of her employees thought they were being treated differently because they were *not* military. Wilder later told Gagnon she was uneasy with the number of military employees in the department.

As a result of the alleged statements made during the meeting outside the training department regarding Wilder's comfort, or lack thereof, Gagnon and Meredith-Ball were placed on written reminder, a form of reprimand. This written reminder prohibited Gagnon and Meredith-Ball from seeking a promotion or transfer without a vice president's approval for a period of six months. Gagnon claims the written reminder, in addition to Wilder's failure to give him a promised ten percent raise in July, and the continued isolation of Gagnon in his department constituted retaliation.

Gagnon subsequently filed this lawsuit charging Sprint PCS with violating USERRA for setting his initial salary $1,000 lower due to his lack of corporate experience and for disciplining him following the meeting outside the Sprint PCS training department building. Gagnon also charged Sprint PCS with violating Title VII and the MHRA for denying his salary raise upon receiving the promotion to CBT Manager.

II. DISCUSSION

The grant of a judgment as a matter of law is reviewed de novo, applying the same standards used by the district court. Fogelbach v. Wal-Mart Stores, Inc., 270

F.3d 696, 700 (8th Cir. 2001). Pursuant to Rule 50, judgment as a matter of law should only be granted when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. Fed. R. Civ. P. 50(a)(1). "In making this determination, the court must draw all reasonable inferences in favor of the nonmoving party without making credibility assessments or weighing the evidence." Phillips v. Collings, 256 F.3d 843, 847 (8th Cir. 2001).

A. Discrimination Claim

Plaintiffs like Gagnon pursuing claims of discrimination under Title VII have two models under which they may proceed. First, a plaintiff can proceed under the three-stage, burden-shifting standard set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this standard, Gagnon must first establish a prima facie case of discrimination. Once the prima facie case is established, the burden shifts to Sprint PCS to articulate a non-discriminatory reason for the adverse employment action. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). If Sprint PCS articulates such a reason, Gagnon must respond with sufficient evidence that the proffered reason was really a pretext for intentional discrimination. Id. At all times under this model, the burden of persuasion remains on Gagnon, the plaintiff. Id.

Alternatively, Gagnon can proceed under the mixed-motive standard set forth in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), if he is able to produce "direct evidence that an illegitimate criterion . . . 'played a motivating part in [the] employment decision.'" Cronquist v. City of Minneapolis, 237 F.3d 920, 924 (8th Cir. 2001) (alterations in original) (quoting Price Waterhouse, 490 U.S. at 258). Once Gagnon establishes such direct evidence, the burden shifts to Sprint PCS to demonstrate by a preponderance of the evidence that it would have reached the same employment decision absent any discrimination. Cronquist, 237 F.3d at 924. As modified by section 107 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(g)(2),

the mixed-motive model allows for declaratory relief, injunctive relief, attorney's fees and costs once Gagnon meets his initial burden regarding direct evidence. 42 U.S.C. § 2000e-5(g)(2)(B)(i). Thus, Sprint PCS is liable for discrimination under this model upon direct evidence that it acted on the basis of a discriminatory motive. Breeding v. Gallagher and Co., 164 F.3d 1151, 1156 (8th Cir. 1999). Whether or not Sprint PCS satisfies its burden to show by a preponderance that it would have reached the same employment decision absent any discrimination is only relevant to determine whether the court may award full relief including damages, court ordered admissions, reinstatement, hiring, promotion or other such relief. Id.; 42 U.S.C. § 2000e-5(g)(2)(A) & (B)(ii). We apply this analysis to Gagnon's MHRA discrimination claim as well as his Title VII claim. Dorsey v. Pinnacle Automation Co., 278 F.3d 830, 836 (8th Cir. 2002).

Because this is a claim of reverse race discrimination, Gagnon additionally must show "that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." Duffy v. Wolle, 123 F. 3d 1026, 1036 (8th Cir. 1997) (quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985)). However, if Gagnon fails to make this showing, he may still proceed by adducing sufficient evidence of intentional discrimination against *him*, in order to proceed beyond the prima facie case stage of litigation. Id. In other words, he is clearly able to proceed in a reverse discrimination claim if there is direct evidence of discrimination.

Gagnon first argues that judgment as a matter of law was improper because Mendenhall's statement "I'm not going to pay him. He's just a white guy," is direct evidence of unlawful reverse discrimination. See Price Waterhouse, 490 U.S. at 270-73. The district court held that JAML was appropriate because Kurtze was the decision-maker, not Mendenhall, and there was no evidence that Kurtze knew of Mendenhall's comment or acted on it.

Direct evidence is evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude in such a way that the fact finder could infer that the attitude was more likely than not a motivating factor in the employer's decision. Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426 (8th Cir. 1999). However,

> Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference. For example, stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself will not suffice.

Id. (internal quotations omitted).

Courts look beyond the moment a decision was made in order to determine whether statements or comments made by other managerial employees played a role in the ultimate decisionmaking process. "An employer cannot escape responsibility for willful discrimination by multiple layers of paper review, when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of [protected] workers." Gusman v. Unisys Corp., 986 F.2d 1146, 1147 (7th Cir. 1993).

While Kurtze's decision may have ultimately been free of any discriminatory animus, we cannot sterilize a seemingly objective decision when earlier discriminatory decisions lead to the adverse employment action. See Webb v. St. Louis Post-Dispatch, 51 F.3d 147, 149 (8th Cir. 1995) (finding that the employer's failure to accommodate the plaintiff's nervous condition possibly constituted discriminatory treatment even though Post's ultimate decision to terminate Webb was based upon his unexcused absenteeism); Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1318, 1324-25 (8th Cir. 1994) (finding a supervisor's comment that "women . . . were the worst thing" that had happened to the company to be direct evidence of

discrimination supporting an inference that an illegitimate criterion was a motivating factor in an employment decision, even though the division manager made the ultimate decision to terminate the plaintiff); Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051, 1057-58 (8th Cir. 1993) (looking beyond the moment the decision to fire the plaintiff was made, which was free from discrimination, because the plaintiff's supervisor had treated her differently than her male counterparts).

The district court stated that the evidence introduced at trial revealed that Kurtze, not Mendenhall, was the decisionmaker for Gagnon's October 1997 raise and potential fifty percent increase. We fail to find any evidence of this in the record. According to the trial testimony, Meredith-Ball submitted the proposal for the full base salary increase to $66,000 to Mendenhall and he rejected the proposal because Gagnon was "only a white guy." After this rejection, the proposal was amended to reflect an eleven percent increase followed by an automatic ten percent increase in six months. This second proposal was the only compensation increase put before Kurtze. Gagnon alleges discrimination based upon the fact that Mendenhall rejected the initial base increase proposal submitted by Meredith-Ball. That initial proposal was never before Kurtze because of Mendenhall's blanket rejection and alleged discriminatory comments. Thus, Mendenhall *was* the final decisionmaker as to the initial decision to deny Gagnon a base increase from $44,100 to $66,000 in October 1997.

Without judging the credibility of these witnesses, we believe there is sufficient evidence to place before a jury Sprint PCS's reasons for rejecting Gagnon's initial salary increase in October 1997. Since there exists direct evidence of discrimination, Sprint PCS bears the burden of showing that it would have reached the same employment decision absent any discrimination. Price Waterhouse, 490 U.S. at 258. In other words, Sprint PCS must show the proffered raise from $44,100 to $66,000 would have been reduced to an eleven percent increase absent Mendenhall's discriminatory remarks. This determination must be made by the finder of fact, and therefore judgment as a matter of law was inappropriate.

B. Retaliation Claim

Gagnon claims Sprint PCS unlawfully retaliated against him after his EEOC claim in April 1998 by issuing a reprimand in the form of a written reminder and by failing to approve additional compensation increases as Wilder had allegedly promised. Gagnon claims this constituted a hostile work environment and affected Gagnon's future career prospects at Sprint PCS. "Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, makes it unlawful for an employer to discriminate against an employee, for among other things, 'because [s]he has opposed any practice made an unlawful employment practice by this subchapter.'" Buettner v. Arch Coal Sales Co., 216 F.3d 707, 713 (8th Cir. 2000) (alteration in original) (quoting 42 U.S.C. § 2000e-3). Absent direct evidence of discrimination invoking the mixed-motive analysis of Price Waterhouse, the burden-shifting analysis of McDonnell Douglas applies to claims of retaliation. Buettner, 216 F.3d at 713.

> To establish a prima facie case of retaliatory discrimination, a plaintiff must show: (1) [he] engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal connection existed between participation in the protected activity and the adverse employment action.

Id. at 713-14 (citations omitted). Effectively, the same standards apply to Gagnon's MHRA retaliation claims.[2] Id. at 714.

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[2]We recognize that Missouri Revised Statute § 213.070(2) prohibits retaliation "in *any* manner against *any* person" and that this language is broader than that found under Title VII, section 2000e-3. Mo. Rev. Stat. § 213.070(2) (emphasis added). See Keeney v. Hereford Concrete Prods., Inc., 911 S.W.2d 622, 625-26 (Mo. 1995). However, we do not reach the outer boundaries of section 213.070 in this matter as Gagnon is a person who falls within both provisions, as does the alleged manner of retaliation. Thus, we reach the same conclusion under both Title VII and the MHRA in this case.

Gagnon introduced evidence at trial regarding his account of the poor treatment he received from Wilder and others in his department after he filed a charge with the EEOC. He also received a written reminder on August 27, 1998, which Gagnon claims further evidences the hostile environment because it was issued one month after Sprint PCS filed its response to his EEOC claim. The district court held that Gagnon failed to establish that either of these actions rose to the level of actionable retaliation under controlling Eighth Circuit authority.

"An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." Spears v. Missouri Dep't of Corr. and Human Res., 210 F.3d 850, 853 (8th Cir. 2000) (citation omitted). "Termination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects meet this standard . . .." Id. (citation omitted).

It is well-settled in this circuit that ostracism and rudeness by supervisors and co-workers do not rise to the level of an adverse employment action. Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 969 (8th Cir. 1999) (finding general allegations of co-worker ostracism are not sufficient to rise to the level of an adverse employment action); Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 693 (8th Cir. 1997) (holding that disrespect and ostracism did not rise to the level of actionable adverse employment action because there was no tangible change in duties or working conditions). Gagnon failed to establish that the alleged ostracism by Wilder and co-workers rose to the level of actionable retaliation. Gagnon's testimony reflects that Wilder ignored him and that it became difficult for him to function as a member of her team, but provides no evidence that this behavior had any impact on his job title, salary, benefits, or any other material aspect of his employment. See Spears, 210 F.3d at 854 (finding the plaintiff's transfer to a new location merely an inconvenience and not actionable under Title VII because there was no evidence that her transfer had any

impact on her job title, salary, benefits, or any other material aspect of her employment).[3]

Gagnon further alleges the August 1998 written reminder significantly affected his future career prospects because it limited his ability to seek promotions or transfers. In fact, Gagnon alleges that as a result of the written reminder, his future career prospects were eliminated altogether. We question whether the effect of the written reminder constitutes an adverse employment action but note that even unfavorable evaluations might be actionable if the employer subsequently uses them as a basis to detrimentally alter the terms or conditions of employment. Id. "Papering" an employee's file with negative reports and reprimands may sufficiently support a claim of retaliation if they adversely affect or undermine an employee's position. Kim v. Nash Finch Co., 123 F.3d 1046, 1060 (8th Cir. 1997).

In granting JAML to Sprint PCS on this issue, the district court relied on our decision in Flannery v. Trans World Airlines, Inc., 160 F.3d 425 (8th Cir. 1998). The district court cited Flannery for the proposition that "an admonishment to an employee is not actionable retaliation." Our holding in Flannery was not so broad. We determined in Flannery that admonishment and removal of complimentary letters from an employee's personnel file did not constitute an adverse employment action in that case because the employee failed to allege that these actions resulted in reduced salary, benefits, seniority, or responsibilities, or any other materially significant disadvantage. Id. at 428. Gagnon, on the other hand, alleges that the written reminder resulted in the

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[3]We again note that Gagnon failed to establish that the alleged ostracism by Wilder and co-workers rose to the level of actionable retaliation under the MHRA because he failed to provide sufficient evidence as a matter of law that "as a direct result [of protected activity], he . . . suffer[ed] any damages due to [this] act of reprisal." Keeney, 911 S.W.2d at 625; Buettner, 216 F.3d at 715 n.8; Cross v. Cleaver, 142 F.3d 1059, 1076 (8th Cir. 1998).

outright closing of job openings to him and the loss of opportunity to compete for any position, which, if true, might support a claim of retaliation.

Our final inquiry on Gagnon's claim of retaliation is whether he has raised sufficient evidence as a matter of law connecting the adverse employment action to his EEOC claim. The written reminder was issued after Sprint PCS investigated the circumstances surrounding the meeting outside of the department held by Gagnon and Meredith-Ball. On its face, the written reminder clearly sets forth the reasons for its issuance–because Gagnon, as a member of the management team, created a false perception of discrimination and Sprint PCS was concerned with his level of professionalism, personal effectiveness and team conduct. Gagnon places great emphasis on the fact that the written reminder was issued one month after Sprint PCS filed its response to his EEOC claim. But, "[g]enerally, more than a temporal connection . . . is required to present a genuine factual issue on retaliation." Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999). Thus we look to Gagnon's remaining evidence to determine whether he has satisfied his burden as a matter of law.

We find as a matter of law that Gagnon fails to prove any causal connection between his EEOC claim of discrimination and the issuance of the written reminder. Even though Gagnon did not violate a company policy when he gathered with his fellow employees outside of the building, Sprint PCS certainly had the authority to issue a reminder regarding the effect of that meeting, given the fact that Gagnon was in a management position. Sprint PCS clearly set forth its reason for the issuance of the reminder and identified several personal traits of Gagnon needing improvement. Contrary to Gagnon's argument, the fact that Wilder made a comment regarding her level of comfort with military employees in her department is not dispositive, as it was made to colleagues at a managers' meeting, and furthermore does not connect the issuance of the written reminder with the filing of Gagnon's EEOC claim.

Gagnon further claims Wilder had no factual basis for stating in the written reminder that Gagnon created the false perception of discrimination. But Gagnon himself testified that he had a discussion with Wilder and Kim Klosak during their investigation of the matter which suggests that Wilder did make factual findings regarding the meeting held by Gagnon and Meredith-Ball. Finally, Gagnon claims that Wilder's failure to secure a promised raise for Gagnon evidences her retaliatory motive. Again, the evidence doesn't create such an inference. Gagnon testified that Wilder did attempt to increase his compensation in January 1998, he received a small merit increase in April 1998, and he was aware that there were "no guarantees" in Wilder's efforts to secure a raise. Although Gagnon did not receive his allegedly promised July increase, the only connection he makes supporting an inference of retaliation at that point is the timing in connection with his EEOC claim, and that is not enough as a matter of law.

We find the record empty of any evidence connecting Gagnon's EEOC claim filed in April 1998 and the issuance of the written reminder in August 1998. Thus, JAML was appropriate and the opinion of the district court is affirmed on this point. See Kipp v. Missouri Highway Transp. Comm'n, Nos. 01-1814/1922, slip op. (8th Cir. Feb. 20, 2002) (granting JAML because the plaintiff failed to establish the causal link necessary to make out a prima facie case of retaliation).

C. USERRA Discrimination Claim

In reviewing a grant of summary judgment, we review the decision of the district court de novo. Buettner, 216 F.3d at 713. The question before us on appeal is whether the record, when viewed in the light most favorable to the non-moving party, shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Id.

The USERRA, enacted in 1994 to improve the Veterans' Reemployment Rights Act ("VRRA"), prohibits employment discrimination on the basis of military service. Hill v. Michelin N. Am., Inc., 252 F.3d 307, 311 (4th Cir. 2001); 38 U.S.C. § 4311 et. seq. Section 4311(a) provides:

> A person who is a member of . . . [or] has performed . . . in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership . . ..

The USERRA replaced the "sole cause" standard of the VRRA, which "protect[ed] the employee-reservist against discriminations like discharge and demotion, motivated *solely* by reserve status." Knowles v. Citicorp Mortgage, Inc., 142 F.3d 1082, 1085 n.3 (8th Cir. 1998) (emphasis in original) (citation omitted); Newport v. Ford Motor Co., 91 F.3d 1164, 1167 (8th Cir. 1996). Under the USERRA, an employer violates the act when a person's membership in the uniformed services is a *motivating factor* in the employer's action, "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. § 4311(c)(1).

In Gagnon's claim of discrimination under the USERRA, he asserts that because of his military background, he received a lower starting salary. The district court held that because Sprint PCS provided evidence of a factor other than Gagnon's military service to explain the disparity in his initial pay, Sprint PCS's motion for summary judgment was warranted. However, our inquiry does not carry us that far into the analysis. We find Gagnon fails to state a claim of discrimination under the USERRA. Gagnon has not been denied "initial employment, reemployment, retention in employment [or] promotion," as covered under section 4311(a). Thus, his only basis

for a claim of discrimination under section 4311(a) is that Sprint PCS denied him a benefit of employment due to his prior service membership. Gagnon claims he was paid $1,000 less than his peers at Sprint PCS. The term "benefit," as defined by the USERRA, specifically excludes wages or salary for work performed. 38 U.S.C. § 4303(2). Thus, Gagnon has no basis for maintaining his claim of discrimination under the USERRA.

D. USERRA Retaliation Claim

Gagnon also alleged retaliation under the USERRA based upon Sprint PCS's actions following Gagnon's internal complaints of activity he perceived as illegal USERRA discrimination. The district court held that the USERRA only applies to a retaliation claim if the employee has taken a *formal* enforcement action as provided in section 4323. Thus, the court held that Gagnon was unable to maintain a cause of action for retaliation under the USERRA because he did not file a complaint with the secretary of labor nor commence a civil action against Sprint PCS. We disagree with this initial conclusion. Under a plain reading of the statute, we hold that Gagnon's internal complaints suffice as protected activity under the USERRA.

The USERRA standard for retaliation claims is set forth in 38 U.S.C. §§ 4311(b) and 4311(c)(2):

> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, . . .
>
> (c) An employer shall be considered to have engaged in actions prohibited–(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, . . . or (D) exercise of a right provided for in this chapter, is a motivating factor in the

> employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, . . . or exercise of a right.

Gagnon correctly asserts on appeal that the appropriate standard of proof in a discrimination or retaliation claim under the USERRA is the so-called "but for" test and that the burden of proof is on the employer, once the employee's case is established. Sheehan v. Dep't of Navy, 240 F.3d 1009, 1013 (Fed. Cir. 2001). The legislative history and treatment by other circuits support this evidentiary scheme, set forth below, for USERRA cases. See NLRB. v. Transportation Mgmt. Corp., 462 U.S. 393, 401 (1983) (modified by Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994)). We apply this precedent:

> The procedures established by precedent require an employee making a USERRA claim of discrimination to bear the initial burden of showing by a preponderance of the evidence that the employee's military service was "a substantial or motivating factor" in the adverse employment action. If this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason.

Sheehan, 240 F.3d at 1013 (citations omitted).

Unlike the McDonnell Douglas framework adopted by the district court in this matter, the procedural framework and evidentiary burdens set out in section 4311 shift the burden of persuasion, as well as production, to the employer. "Thus in USERRA actions there must be an initial showing by the employee that military status was at least a motivating or substantial factor in the [employer's] action, upon which the [employer] must prove, by a preponderance of evidence, that the action would have been taken despite the protected status." Sheehan, 240 F.3d at 1014.

One question before us is whether Gagnon's internal complaints constitute an "action to enforce a protection afforded any person" under the USERRA. Under both USERRA and Title VII, a plaintiff must first assert that she engaged in some form of protected activity in order to determine whether the employer retaliated against the employee. However, the district court mistakenly held that the first Title VII inquiry is whether a charge of harassment was filed.[4] The court then went on to hold that although Title VII also protects actions in opposition to perceived conduct prohibited by Title VII, the USERRA protects only formal enforcement of rights in its prohibition of retaliatory conduct. It is clear, though, that like Title VII, many actions may form the basis of protected activities giving rise to a claim of retaliation under the USERRA. Under section 4322(a)(2)(A), the USERRA anticipates that people may take alternate steps or "actions" to seek enforcement of the USERRA, prior to filing a formal complaint with the secretary of labor or filing a civil action.[5] Various

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[4]The elements of a claim of retaliation in violation of Title VII are the following: (1) the plaintiff filed a charge of harassment *or engaged in other protected activity*; (2) the plaintiff's employer subsequently took adverse employment action against the plaintiff; and (3) the adverse action was causally linked to the plaintiff's protected activity. Scusa, 181 F.3d at 968; Cross v. Cleaver II, 142 F.3d 1059, 1071 (8th Cir. 1998). "Protected activities" under Title VII include much more than merely filing a formal charge of harassment. Fierros v. Texas Dep't of Health, 274 F.3d 187, 194 (5th Cir. 2001) (recognizing that internal discrimination complaints and use of employer's internal administrative processes are clearly protected activities for purposes of a Title VII retaliation claim); Raniola v. Bratton, 243 F.3d 610, 624 (2d Cir. 2001) (finding internal complaint to be a qualified activity protected from retaliation by Title VII and citing authority noting that "Congress sought to protect a wide range of activity in addition to the filing of a formal complaint") (citation omitted); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1255 (10th Cir. 2001) (finding informal complaints to superiors constitute protected activity under Title VII).

[5]"A person who claims that such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by an employer; and such employer has failed or refused, or is about to fail or refuse, to

informal activities could occur in order for an employee to determine that their employer has not complied with or will not comply with the USERRA. The formal procedures of enforcement are merely another alternative under the USERRA once an employee makes this determination.

We find further support for the proposition that an "action to enforce a protection afforded any person" under the USERRA subsumes more than just formal complaints filed with the secretary of labor or civil actions in Brandsasse v. City of Suffolk, Virginia, 72 F. Supp. 2d 608, 619 (E.D. Va. 1999). In Brandsasse, the plaintiff was a city police officer who was refused consideration for a promotion allegedly because of discrimination he incurred as a result of his Army Reserve obligations. Id. at 611-12. The court concluded that sufficient allegations were made by the plaintiff to support a cause of action for retaliation. Id. at 619.

The basis of the plaintiff's claim in Brandsasse was that he took steps to enforce his rights under the statute by speaking with the director of personnel, and hired counsel to pursue his claims under the USERRA. The defendants subsequently began a retaliatory investigation. Id. at 612, 619. The district court in Brandsasse did not dismiss the claim because the plaintiff had not *formally* filed a claim with the secretary of labor nor filed a civil action against the defendants. In fact, the court concluded that raising internal complaints and seeking the advice of outside counsel "seems to be exactly the sort of adverse employment action which the statute contemplates." Id. at 620.

We agree with the assessment in Brandsasse and find that Gagnon, too, engaged in just the sort of conduct which the statute contemplates. We also previously

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comply with the provisions of this chapter, . . . may file a complaint with the Secretary in accordance with subsection (b), and the Secretary shall investigate such complaint." 38 U.S.C. § 4322(a)(1) & (2)(A).

established that a written reminder may constitute an adverse employment action. Thus, Gagnon's final burden was to establish that his military status was at least a motivating or substantial factor in Sprint PCS's issuance of the written reminder. Sheehan, 240 F.3d at 1014. This is where Gagnon falls short. Gagnon does not refer us to any causal evidence supporting his claim of retaliation under the USERRA. Our review of the record suggests that there is no evidence connecting Gagnon's internal complaints of discrimination and the issuance of the written reminder following the meeting held outside of the department by Gagnon and Meredith-Ball. Because Gagnon is unable to meet his burden as a matter of law to establish a prima facie case of retaliation under the USERRA, the district court grant of summary judgment is affirmed.

E. Evidentiary & Discovery Issues

Gagnon finally urges us to instruct the district court to vacate its ruling denying admission into evidence Plaintiff's Exhibit 306 containing salary information of Sprint PCS employee Frank Gardi. Gagnon also requests that the district court on remand (1) vacate its rulings on Gagnon's motion to compel regarding the attorney-client and work-product privileges asserted by Sprint PCS due to the involvement of its in-house counsel Martin; (2) vacate the protective order entered over the deposition of Paul Bass; (3) vacate its ruling denying admission into evidence of Plaintiff's Trial Exhibits 37, 38, 39, 252, and 294 involving communications with Martin.

A district court's refusal to compel discovery is reversed upon a showing of gross abuse of discretion. Wilson v. Int'l Bus. Machs. Corp., 62 F.3d 237, 240 (8th Cir. 1995). We find no abuse of the court's discretion concerning the motion to compel the documents protected by the work-product privileges asserted by Sprint PCS. The district court conducted an *in camera* review of specific documents and

twice entertained substantial briefing by both parties. Even though Gagnon argues that these documents are not subject to the work-product privilege because they were created in the ordinary course of Sprint PCS's business, the district court found they were prepared in anticipation of litigation and therefore protected from discovery. The district court's holding, based upon a careful review of the documents, as well as both parties' briefing on the matter, is not a gross abuse of discretion, and we therefore affirm.

Gagnon also challenges the protective order issued by the district court concerning the deposition of Paul Bass. Paul Bass was one of the individuals involved in the internal investigation of Gagnon's claim of retaliation. The district court granted Sprint PCS's protective order, holding that the investigation by Bass, at the direction of Martin, was in anticipation of litigation and is covered by the attorney work-product privilege. Gagnon, citing Upjohn Co. v. United States, 449 U.S. 383, 395 (1981), argues that the attorney-client privilege only protects disclosure from communications, not disclosures of the underlying facts by those who communicated with the attorney. Gagnon claims Bass is a fact witness and not Sprint PCS's corporate representative, thus he is outside the scope of the attorney-client privilege. The district court, however, did not abuse its discretion in making a contrary finding, noting that the investigation conducted by Bass was an integral part of in-house counsel Martin's investigation. We affirm.

Finally, Gagnon challenges several evidentiary rulings made by the district court at trial. We review a trial court's evidentiary rulings under the abuse of discretion standard, according the district court substantial deference. Shelton v. Consumer Prods. Safety Comm'n, 277 F.3d 998, 1009 (8th Cir. 2002).

At trial, Gagnon sought to introduce five documents reflecting e-mails and letters between Sprint PCS's in-house counsel, Gagnon and Meredith-Ball concerning Gagnon's complaint of retaliation. Gagnon mistakenly argues on appeal that the district court excluded these documents based upon the fact that they were communications with in-house counsel and were thus privileged. The transcript reveals that prior to trial, the district court sustained the motion in limine because the judge failed to see the relevancy of these documents. We also fail to see how these documents are relevant to Gagnon's "totality of the circumstances" argument that he raises on appeal . Gagnon is not making a claim concerning the internal investigation conducted by Sprint PCS regarding Gagnon's claim of discrimination or retaliation. We hold that the district court did not abuse its discretion in excluding Exhibits 37, 38, 39, 252, and 294 in its pre-trial ruling.

Gagnon's last evidentiary challenge is the district court's exclusion of evidence regarding a salary increase given to another Sprint PCS employee after the dates relevant to Gagnon's employment at Sprint PCS. Gagnon sought to introduce this evidence to prove that Sprint PCS does in fact entertain raises above fifty percent, contrary to proffered trial testimony. However, we find the district court did not abuse its discretion when it found that any evidence of Sprint PCS's policies regarding compensation in 1999 or 2000 are irrelevant in the instant case as to compensation policies in 1997 and 1998. We affirm the ruling of the district court.

III. CONCLUSION

We reverse the district court's grant of Sprint PCS's motion for JAML on Gagnon's claim of discrimination under Title VII and the MHRA. The district court's grant of JAML on Gagnon's claim of retaliation under Title VII and the MHRA, its summary judgment on Gagnon's claims of discrimination and retaliation under the

USERRA, as well as its rulings regarding pre-trial discovery and trial evidentiary matters stand affirmed. We remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2505

William E. Gagnon, Jr.,

Appellant,

v.

Sprint Corporation, etc., et al.,

Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petitions for rehearing by the panel is also denied.

(5128-010199)

May 22, 2002

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

——————VIA TRANSMISSION——————

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Circuit Clerks Office
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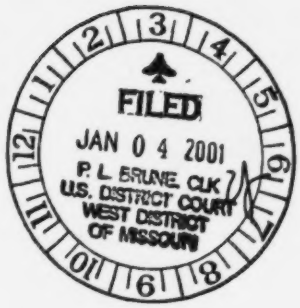
IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION



WILLIAM E. GAGNON, JR., Plaintiff,	)	
v.	)	No. 99-0683-CV-W-1
SPRINT CORP., et al., Defendants.	)	

ORDER

Pending before the Court are motions for summary judgment for Defendants, Sprint Corp., et al. ("Sprint PCS"), and Plaintiff, William E. Gagnon, Jr. ("Gagnon"). In Counts I and II of his Complaint, Gagnon charges Sprint PCS with violating the Uniformed Services Employment and Reemployment Rights Act ("USERRA") by paying him a lower starting salary due to his military experience and for retaliatory discipline. Gagnon alleges in Counts III and IV that Sprint PCS violated Title VII and the Missouri Human Rights Act's ("MHRA") prohibition of discrimination based on race or gender when it denied him a higher salary upon Gagnon's promotion.

Sprint PCS moves for summary judgment as to Counts I and II, arguing that it based its starting salary decision on a legitimate non-discriminatory reason and that Gagnon did not participate in a protected activity in order to receive protection against retaliatory discipline. Gagnon also moves for summary judgment as to Count I and argues in support that direct evidence shows that Sprint PCS' decision regarding his starting salary pay was motivated by Gagnon's prior military experience. Gagnon, in turn, moves for summary judgment for charges set forth in Counts III and IV. Gagnon contends that evidence shows that Sprint PCS committed reverse discrimination when it denied him

DOCUMENT # 125

a near-fifty percent raise upon receipt of a management promotion. In addition, Gagnon moves to strike affidavits submitted by Sprint PCS in opposition to Gagnon's summary judgment motion. For the following reasons, the Court grants Sprint PCS' partial summary judgment motion, denies Gagnon's motion for summary judgment, and denies the motions to strike affidavits submitted by Sprint PCS.

I. BACKGROUND

Gagnon applied for a position with Sprint PCS' professional skills team under the direction of Larry Snyder ("Snyder") in January 1997. Shortly after his initial application, Snyder recommended Gagnon apply for a different Sprint PCS job, a curriculum specialists. Thereafter, Gagnon submitted a new application on January 21, 1997, and interviewed with Snyder and Jim Keenan ("Keenan"), both of whom were managers in the training department, and Kathleen Wilder ("Wilder"), the director of the department.[1] Keenan subsequently hired Gagnon as a curriculum specialists with the approval of Wilder and Jim Mendenhall ("Mendenhall"), a vice-president.

Before applying to Sprint PCS, Gagnon served in the United States Army until his retirement as a Lieutenant Colonel on January 31, 1997. While serving in the Army, Gagnon worked for six years in charge of a team that researched, developed, and published training and wartime doctrine for Army division level organizations. Gagnon also worked for two years as the operations officer at a battle simulation center in Korea. Gagnon began working for Cubic Applications, Inc, ("Cubic") developing combat simulation for the Army following his active service with the Army and continuing

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[1] The uncontroverted record indicates that one or two other individuals interviewed Gagnon. These individuals are not identified by Plaintiff or Defendant, are not the basis of Plaintiff's claims, and, so, will be ignored for purposes of this motion.

until his employment with Sprint PCS. Gagnon's salary while working at Cubic was $42,000.

Sprint PCS hired Gagnon at a starting salary of $44,100 with a short-term incentive potential ("SPI") of $3,000, over twelve percent above Gagnon's Cubic salary. Gagnon worked under Keenan from his initial start date, March 11, 1997, until his promotion.

On October 10, 1997, Gagnon was promoted to Manager, Multimedia/CBT Training, a promotion that Wilder previously advised Gagnon he would receive when it was created.[2] However, during October 1997, Wilder was out of the office on maternity leave and Keenan and Lynn Meredith-Ball ("Meredith-Ball"), another manager in Wilder's department, assumed Wilder's responsibilities as director of the training group. In Wilder's absence, Mendenhall directed[3] that Gagnon be promoted to the manager position.

Manager, Multimedia/CBT Training ("CBT Manager"), was a new position and did not have a dollar amount assigned by Sprint PCS for compensation. Therefore, Gagnon submitted, with the assistance of Meredith-Ball, a job description for the position to Sprint PCS so that a compensation amount could be assigned to the position. The Sprint PCS compensation group established a target, or MRP, salary of $66,000 with a SPI of $9,500. Thereafter, Meredith-Ball and Gagnon prepared a form to submit in order to raise Gagnon's salary from $44,100 to $66,000, an increase of over forty-nine percent. The Sprint PCS compensation group within the Human Resources Department at Sprint PCS did not support Gagnon's proposed forty-nine percent salary raise but instead proposed

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[2] Defendant used the term "funded" and the record indicates that Plaintiff used the word "created", "created" will be used for purposes of this Order.

[3] Plaintiff and Defendant can not agree whether Mendenhall "directed" or "approved" Plaintiff's promotion. Mendenhall said to Meredith-Ball, in reference to Plaintiff and the management promotion, "He [Gagnon] is here, hire him now." Meredith-Ball deposition, p. 71:15-21. The Court will use the term "directed" when referring to this action.

a raise of twenty-five percent. Mendenhall, who was responsible for approving all raises over ten percent, rejected Gagnon's forty-nine percent raise. Meredith-Ball revised the compensation form to request an eleven percent initial raise followed by an automatic ten percent raise in six months. The initial pay raise received the approval of Julie Moylan ("Moylan"), an employee in the Human Resources Department, but the second automatic pay raise was not supported. Moylan suggested the second raise should be processed with "separate approval action." Mendenhall approved Meredith-Ball's revised form of an initial raise and an automatic raise in six months, however, Al Kurtze ("Kurtze"), the Chief Operating Officer, agreed with Moylan's recommendation about the second automatic raise.[4]

With the approval of the eleven percent raise, Gagnon began work as a CBT Manager with a base salary of $50,100 and a SPI of $9,500. On January 29, 1998, Wilder submitted a compensation request form to increase Gagnon's salary to $57,616, an amount within fifteen percent of the CBT Manager's MPR salary of $66,000. Moylan concurred on the compensation request and it was subsequently approved by John Garcia ("Garcia") and Alex Battey ("Battey"), Market Development vice-president. Gagnon again received an increase in his salary on April 4, 1998, with the approval of a "merit" increase of $1,119.17. The merit increase brought Gagnon's salary to $58,735.44. On March 27, 1999, Gagnon received another merit increase of $2,349, raising his salary to $61,084.44. Gagnon received a final upward "adjustment" of $3,157.06 to his pay on April 11, 1999, as a result of his position's reclassification into the Sprint compensation system. After the final April adjustment, Gagnon's CBT Management salary was $64,241.50.

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[4] The record, and uncontroverted facts, tend to show that Mendenhall's actions required the approval of Kurtze, and, therefore, the second automatic raise was not approved and the Court will treat such as uncontroverted.

In August 1998, Gagnon and Meredith-Ball organized a discussion with four other Sprint PCS employees[5] outside the Sprint PCS training department building.[6] Gagnon and Meredith-Ball informed the group of employees, all of whom possessed prior military experience, of Sprint PCS' growth outside the training department directed by Wilder and the possibility of "upward mobility."[7] During that discussion, various statements report that Gagnon and Meredith-Ball advised the four employees that Wilder was uncomfortable with the number of employees in her department with prior military experience and, therefore, would not promote anyone with such a background.[8] As a result of the statements regarding Wilder's comfort with employees with prior military experience, Gagnon and Meredith-Ball were placed on written reminder (reprimand).[9] The written reminder prohibited Gagnon and Meredith-Ball from seeking a promotion or transfer without a vice president's approval for a period of six months.

Gagnon subsequently filed the present lawsuit, charging Sprint PCS with violating USERRA for setting his initial salary $1,000 lower due to his lack of corporate experience and for disciplining him following the meeting outside the Sprint PCS building, and with violating Title VII and the MHRA for denying his salary raise upon receiving the promotion to CBT Manager.

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5 The four employees were Bill Pearce, Cory Aylor, Steve Hammack, and Brian Schlaak. Gagnon deposition p. 297:1-2.

6 Gagnon deposition p. 296:8 - p.297:21.

7 Id. p. 296:19-25.

8 Pearce deposition p. 33:2-17; Schlaak deposition p. 24:5-11; Aylor deposition p. 41:4-12.

9 Gagnon deposition p. 385:20 - p. 836:8; Wilder deposition p. 112:6-8.

II. SUMMARY JUDGMENT

"Summary judgment is proper where the evidence, when viewed in the light most favorable to the nonmoving party, indicates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 919 (8th Cir. 2000) (citing Allen v. Interior Constr. Services Ltd., 214 F.3d 978, 981 (8th Cir.2000) and Fed.R.Civ.P. 56(c)). In moving for summary judgment against the non-movant, a movant will bear the ultimate burden of proof at trial and may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986).

"[A] party opposing a motion for summary judgment may not rest upon the mere allegations or denials of the pleadings, but by affidavits or as otherwise provided in Rule 56 must set forth specific facts showing that there is a genuine issue for trial." Dancy v. Hyster Co., 127 F.3d 649, 653 (8th Cir. 1997) (internal alterations and quotation marks omitted). When reviewing a motion for summary judgment and viewing the evidence in the light most favorable to the non-movant, a court must draw all inferences in the non-movant's favor. See Exeter Bancorporation, Inc. v. Kemper Sec. Group, Inc., 58 F.3d 1306, 1310 (8th Cir. 1995) (citing AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987)); Oldham v. West, 47 F.3d 985, 988 (8th Cir. 1995) (cautioning that summary judgment should not be granted unless the evidence could not support any reasonable inference for the non-movant) (citing Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994)); see also St. Pierre v. Dyer, 208 F.3d 394, 404 (2d Cir. 2000) ("In assessing the record to determine whether there is a genuine issue as to any material fact, the district court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought").

III. DISCUSSION

Gagnon sets forth facts for two claims of discrimination violations under USERRA. In Count I, Gagnon claims Sprint PCS discriminated against him in violation of USERRA by paying him a lower starting wage due to his prior military experience. Gagnon alleges in Count II that Sprint PCS retaliated against him in violation of § 4311(b) by placing him on written reminder for the August discussion regarding Wilder's comfort with employees who possessed prior military experience. Gagnon also proffers facts for two claims of discrimination in violation of Title VII and the Missouri Human Rights Act for a comment made regarding Gagnon's race and gender.

The Court will first review Sprint PCS' motion regarding Counts I and II before reviewing Gagnon's motion for Counts III and IV.

A. USERRA Discrimination Claim

Gagnon began working at Sprint PCS at a salary of $44,100 and a SPI of $3,000. Suggestions in Support("Def's Suggestions."), ¶ 15. The total amount of compensation, $47,100, was over a twelve percent increase from his salary at Cubic. Id. at ¶¶ 5, 15. The compensation levels at Sprint PCS are established by the Human Resources Department and supervised by Moylan. Id. ¶ 10. The compensation group of the Human Resources Department at Sprint PCS utilized a Market Reference Point (MRP) to assist in the valuation of a position in regard to the marketplace. Id. ¶ 12. A PCS salary is generally expected to be within fifteen percent, "plus or minus, of the MRP." Id.

One of the guidelines used to assist in administering Sprint PCS' compensation program is

the 1997 Salary Management Guide[10] ("SMG"). Def's Suggestions, ¶ 13. One of the guidelines provided in the SMG is an objective to increase a base salary up to twenty percent when a new salary is at or below the MRP. Id. ¶ 14. Some of the factors used to determine the amount of increase include (1) whether the individual holds a similar job or the job change is a promotion, (2) the market pressure, (3) required relocation, (4) the proximity of the current salary to the MRP, (5) if the individual is at an entry level of the position's requirements, and (6) whether the amount of the total compensation increase is significant. Id.

As mentioned earlier, Gagnon's salary was over twelve percent above his previous salary at Cubic and $2,100 above the MRP for Curriculum Specialist. Def.'s Suggestions, ¶ 15. In an attempt to controvert these facts, Gagnon in his opposition to Sprint PCS' motion for summary judgment argues that Sprint PCS failed to recognize his pay while employed in the Army, advised him to not include his military compensation when filling out the application, that Snyder advised him that he was disadvantaged because he was coming from the military, and Wilder paid Gagnon $1,000 less because he gained his previous experience in the military. Plaintiff's Opposition ("Pff's Opposition"), ¶¶ 5-9. Gagnon also argues in his motion for summary judgment that two pieces of direct evidence of discrimination exist. The first involves a statement made by Wilder in which she stated that "[h]e [Gagnon] was brought in about $1,000 less than his peers, based upon the lack of business experience. Most of his experience was in the military, and his counterparts had extensive training within corporations." Id. p. 24 (citing uncontroverted fact ¶ 38). The second piece of direct evidence involves an e-mail from Barbara Glover that requested the recipients consider the military background

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[10] The guide is dated May 1997, after Gagnon's initial employment but before his first promotion in October 1997.

of two interviewees, which was similar to Gagnon's, and the need for diversity at Sprint PCS.[11]

Gagnon is unable to correctly controvert the fact that Sprint PCS set his starting salary within the guidelines later established by its SMG. Instead, Gagnon directs the Court to find discriminatory treatment in Sprint PCS' consideration of his background in establishing a starting salary within its guidelines. The record reflects that Gagnon's employment record lacked extensive corporate experience. And, the record clearly shows that Sprint PCS personnel considered Gagnon's lack of corporate experience in establishing his salary. Gagnon, however, finds discrimination in Sprint PCS' action because his lack of corporate experience is due to his military career.

The Uniform Services Employment and Reemployment Rights Act of 1994, USERRA, prohibits employment discrimination on the basis of military services and provides a private right of action to enforce those rights. See Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F.Supp. 571, 575 (E.D. Tx. 1997); 38 U.S.C. §§ 4311 & 4323 (Supp. I 1997).[12]

Section 4311(a) of USERRA provides that

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[11] Barbara Glover wrote: "I provided my notes regarding the two candidates I interviewed yesterday in a previous e-mail.

The following is a list of things to think about:

- Both candidates are career military.
- Both have worked or currently work for the same company, Logicon, so have very similar backgrounds as far as type of experience since leaving the military. I believe that Bill Gagnon has also worked for the same organization. That would make three people with the same basic background in the training organization.
- Diversity is critical for an organization to grow and thrive.
- Different skill sets, different backgrounds and experiences are essential in a well-rounded training organization.
- the organization should reflect the environment in which it is providing training.

Hope this helps!

Thanks!

Pff's Suggestions, Exh. O (e-mail from Barbara Glover to Jim Keenan, Lynn Meredith-Ball, "cc" to Jim Mendenhall, AJ Francis; Subject: Training Interviews; October 15, 1997).

[12] All references of "USERRA" or 38 U.S.C. § 4311, *et. seq.*, are to the 1997 Supplement.

> [a] person who is a member of, . . . has performed, . . . in a uniformed service shall not be denied initial employment, reemployment, retention, in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a). According to § 4311(c), an employer shall be considered to have acted in violation of § 4311(a) "if the person's membership, . . . service . . . in the uniformed service is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, . . . [or] service. . . ." Id. at § 4311(c)(1).

Based upon the right set forth in subsection (a), § 4311(b) prohibits an employer from

> discriminat[ing] in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter.

Id. at § 4311(b). An employer shall also be considered to have acted in violation of § 4311(b) if the person's acts that are enumerated in § 4311(b) are "a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right. Id. at § 4311(c)(2).

The Eighth Circuit has published few decisions substantively addressing claims arising under USERRA. See Newport v. Ford Motor Co., 91 F.3d 1164 (8th Cir. 1996) (holding in a case brought under the Veterans Reemployment Rights Act that USERRA's "motivating factor" standard was not to be applied retroactively); Knowles v. Citicorp Mortg., Inc., 142 F.3d 1082 (8th Cir. 1998) (discussing the Newport precedent of denying retroactive application of the "motivating factor"

standard). Thus, the Court will look to cases from within and outside the Eighth Circuit for assistance with principles and analysis. See Robinson, 974 F.Supp. at 575 (deciding to look to other circuits and district courts because the Fifth Circuit and Supreme Court had not addressed claims under USERRA).

Because Gagnon's claims he was denied an employment benefit (an unequal starting salary) due to Sprint PCS' discrimination in violation of USERRA, the Court will use the Title VII and Equal Pay Act ("EPA") standard that applies to claims involving "unequal pay for equal work." See Hutchins v. International Brotherhood of Teamsters, 177 F.3d 1076, 1080 (8th Cir. 1999) (citing Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1156 (8th Cir. 1999)). Similar to § 4311(c), in order to establish a prima facie case of pay discrimination using the Title VII and EPA standard, a plaintiff must prove that the employer paid non-military employees higher salaries than it paid the plaintiff for "jobs 'requiring equal skill, effort and responsibility, and which are performed under similar working conditions.'" Id. (citing EEOC v. Delight Wholesale Co., 973 F.2d 664, 669 (8th Cir. 1992) and 29 U.S.C. § 206(d)(1)). Upon establishing a prima facie case, the Title VII and EPA unequal pay standard again closely follows § 4311(c) by shifting the burden to the employer to prove that the alleged disparities "were based on either (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality; or (4) a factor other than sex." Id. (ruling on an unequal pay for equal work claim alleging discrimination based on the plaintiff's sex) (citing 29 U.S.C. § 206(d)(1) and McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 513 (8th Cir. 1995); see 38 U.S.C. § 4311(c).

An individual's education and experience are recognized by the Title VII and EPA unequal pay standard as "factors other than" (the fourth possible reason stated in the Hutchins decision),

which permit unequal pay. See Id. at 1081 (citations omitted). As Gagnon pointed out, Wilder considered Gagnon's "lack of business experience" when making her decision on his starting pay. There is not a bright line distinction between "den[ing] . . . any benefit of employment . . . on the basis of that membership, application for membership, performance of service, application for service, or obligation [in the uniformed service]," 38 U.S.C. § 4311(a), and denying a benefit because a person lacked a quality due to military service. But, an employer's conduct is not in violation of USERRA, according to § 4311(c)(1), if "the employer can prove that the action would have been taken in the absence of" the employee's military service. 38 U.S.C. § 4311(c)(1). And, the Title VII and EPA unequal pay standard permits an employer to consider the past experience of an individual in order to establish a pay rate that is different than those who work at the same position.

Clearly a hospital would not violate § 4311 of USERRA if it refused to hire as a surgeon a former military serviceman who is not a doctor. There would not be a case of discrimination for the former military serviceman even though his lack of education and experience was a result of his service in the military. The hypothetical analysis, and possible outcome, begin to change if those facts are varied and the former military serviceman is in fact a medical doctor. While not dispositive, greater scrutiny would be required in order to determine the former serviceman's type of medical practice and experience. For, even though the former military doctor might be qualified as a surgeon, it is not beyond the realm of possibilities that his surgical practice varied from that sought by the hospital. The hospital could lawfully pay the former military surgeon a lower starting salary because it does not place as high a value on his experience compared to other surgeons. The hospital could also pay a higher salary because it views the military doctor's experience more valuable than other surgeons. A violation of USERRA occurs in the hypothetical fact pattern when the hospital views

the military doctor's experience equal to other doctors but pays a lower salary because it holds a discriminatory animus against the military, its members, and, specifically, the military doctor.

In the present case, Gagnon possessed experience, education, and other qualities that Sprint PCS viewed as valuable to its business operation. Thus, Sprint PCS hired Gagnon to work because of his experience, education, and other qualities. Sprint PCS, however, did not value Gagnon's lack of corporate experience as high as other possible new employees. The fact that Gagnon's lack of corporate experience occurred because he worked in the military or in a religious mission is not relevant or distinguishable. Sprint PCS established Gagnon's salary within the Salary Management Guide's fifteen percent target but $1,000 lower to reflect the lower value it placed on a lack of corporate experience. Gagnon does not present evidence of another Sprint PCS employee who was paid the extra $1,000 yet also lacked corporate experience. See Hutchinson, 177 F.3d at 1080-81 (finding that sex-based pay discrimination did not exist because the higher paid male employees possessed more education and experience and male employees who had like education and experience were paid the same as the plaintiff). Sprint PCS established that its decision to not pay Gagnon a higher starting salary is based on a factor other than Gagnon's military experience.

Gagnon's second piece of direct evidence does not aid his argument. Glover's e-mail that request its recipients consider the diversity in the training department of Sprint PCS did not discriminate against Gagnon in violation of USERRA. The e-mail does not ask the reader to deny an employment benefit, fire, or demote Gagnon. The statement, read in the most discriminatory light and with every inference in favor of Gagnon, is requesting that Sprint PCS deny two applicants employment due to their military experience because Sprint PCS already employed individuals with military experience. Gagnon is the only plaintiff before the Court in this lawsuit and, therefore, unable

to utilize a possible discriminatory statement made in reference to third parties to establish a prima facie case of discrimination claim under the Title VII and EPA equal pay standard.

Because Sprint PCS provided evidence of a factor other than Gagnon's military service to explain the disparity in pay, Gagnon's motion for summary judgment for his claim of discrimination based upon a lower starting salary, Count I, is denied and Sprint PCS' motion for summary judgment on the same claim is granted.

B. USERRA Retaliation Claim

Sprint PCS also moves for summary judgment on Gagnon's USERRA retaliation claim, Count II, because Gagnon did not engage in a protected activity and did not suffer an actionable adverse employment action. Gagnon counters that internal complaints of discrimination are a USERRA protected activity and adverse employment action includes a written reprimand.

USERRA protects any person who "has taken an action to enforce a protection afforded . . . under [USERRA], (2) has testified or otherwise made a statement in or in connection with any proceeding under [USERRA], (3) has assisted or otherwise participated in an investigation under [USERRA], or (4) has exercised a right provided for in [USERRA]" from discrimination or adverse employment action. 38 U.S.C. § 4311(b). If the exercise of rights protected under subsection (b) is a motivating factor in an employer's action, then the employer will "be considered to have" violated subsection (b). Id. § 4311(c). The employer's action, however, is not in violation of USERRA if the employer can prove that it would have acted in the absence of the exercise of rights protected under subsection (b). Id.

The Court finds persuasive a decision by a district court in South Dakota that utilized the

burden shifting framework set forth in McDonnell Douglas Corp. v. Green for analysis of a USERRA retaliatory discrimination claim. See Novak v. MacKintosh, 1996 WL 677104 *1 (D. S.D. 1996) (referring to McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668(1973)). Under the McDonnell Douglas framework, Gagnon must initially establish a prima facie case of discrimination "by showing participation in a protected activity, a subsequent adverse action by the employer, and some evidence and some causal connection between the protected activity and the subsequent adverse action." Novak, 1996 WL 677104 *2; see Roark v. City of Hazen, Ark., 189 F.3d 758, 761 (8th Cir. 1999). Following the establishment of a prima facie case by the plaintiff, the burden then shifts to the employer to articulate an appropriate nondiscriminatory reason for the alleged adverse employment action. Id. If an employer establishes an appropriate nondiscriminatory reason, the burden returns to the plaintiff to demonstrate that the employer's proffered reason is pretextual. Id. (citing Reich v. Hoy Shoe Co., Inc., 32 F.3d 361, 365 (8th Cir.1994) and Schweiss v. Chrysler Motors Corp., 987 F.2d 548, 549 (8th Cir.1993)).

Both USERRA and Title VII rely on the assertion of a protected right as the beginning event in order to determine whether the employer retaliated against the employee. Title VII looks to see if a charge of harassment was filed[13] while USERRA evaluates whether the person took action, testified in any proceeding, participated in an investigation, or exercised a USERRA right. Thus, USERRA uses the beginning of a person's formal enforcement of the rights protected by USERRA in order to find retaliatory conduct.

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[13] In the context of a Title VII claim of retaliation, a plaintiff must show that "(1) he filed a charge of harassment; (2) subsequent adverse action by the employer; and (3) the adverse action was causally linked to the protected activity." Ross v. Douglas County, Neb., 2000 WL 1804354 *2 (8th Cir. 2000) (citing Scusa v. Nestle U.S.A. Co., Inc., 181 F.3d 958, 968 (8th Cir.1999)).

Congress set forth two possible ways to formally enforce the rights protected by USERRA. The first method of enforcement occurs by filing a complaint with the Secretary of Labor that summarizes the basis for the alleged military discrimination. 38 U.S.C. § 4322(b). Subsequently, the Secretary shall investigate the allegations in the complaint and attempt to resolve the complaint by ensuring compliance with USERRA. Id. § 4322(d). If the Secretary fails to resolve the complaint, then the Secretary is directed to notify the person who submitted the complaint "of the Secretary's investigation; and (2) . . . entitlement to proceed under the enforcement of rights provision provided under section 4323. . . ." Id. § 4322(e). After receiving notification from the Secretary of an unsuccessful effort to resolve the complaint, a person may request the Secretary to refer the complaint to the Attorney General to commence an action for relief. 38 U.S.C. § 4323(a).

The second enforcement method allows a person to commence an action for relief if he or she chose not to apply to the Secretary for assistance pursuant to § 4322(a), not request that the Secretary refer the complaint to the Attorney General, or if the Attorney General refuses to represent the person. Id. § 4323(b).

The Court's conclusion that USERRA requires formal enforcement for a retaliation violation is supported by a comparison of USERRA and Title VII. Under Title VII, a retaliation violation can occur upon an individual either filing a formal complaint (what is referred to as the "participation clause") or taking action in opposition to perceived conduct prohibited by Title VII (the "opposition clause"). See Reginelli v. Motion Indus., Inc., 987 F.Supp. 1137, 1139 (E.D. Ark. 1997) (explaining that the purpose for Title VII's informal "opposition activity" clause is to provide an alternate method to formal litigation to resolve a dispute); Pfister v. Bryan Mem'l Hosp., 874 F.Supp. 993, 995-96 (D. Neb. 1995) (discussing Title VII's two retaliation clauses, the "opposition" and "participation"

clause); Hargens v. U.S. Dept. of Agric., 865 F.Supp. 1314, 1328 (N.D. Ia. 1994) (same).

In comparison to Title VII, in response to a Supreme Court decision, Congress amended the Veterans' Reemployment Rights Act in 1994 with USERRA to require that claimants only show that military status was a motivating factor for the employer's action. See Newport, 91 F.3d at 1167 (explaining that Congress amended the Veterans' Reemployment Rights Act due to the Supreme Court decision in Monroe v. Standard Oil Co., 452 U.S. 549, 559, 101 S. Ct. 2510, 2516, 69 L. Ed. 2d 226 (1981), which required claimants to show that military status was the sole factor for the employer's action). In amending the Veterans' Reemployment Rights Act, Congress chose not to provide a retaliation violation for informally opposing employment action that a claimant perceived to be discrimination (based on military status) even though it had done so in Title VII.

The Court's decision is also supported by principals of statutory construction. The starting point for interpreting a statute is the statute's plain language and such should be conclusive absent contrary legislative intent. See Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835,110 S. Ct. 1570, 1575, 108 L. Ed. 2d 842 (1990) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980)). If Congress intended to create a USERRA retaliation cause of action for a person's opposition then it would have done so instead of relying on federal courts to "draft" such an important piece of legislation. See Schooler v. U.S., 231 F.2d 560, 565 (8th Cir. 1956) ("If Congress desired to extend the statute beyond bank loan transactions, which was all that the original statute encompassed, we must conclude they would have said so and not left it to the courts to legislate by broadening the terms of the statute."); De Moss v. U.S., 218 F.2d 119, 127 (8th Cir. 1955) ("It is not the province of the court to legislate."), rev'd, 349 U.S. 918, 75 S. Ct. 659, 99 L. Ed. 1251 (1955). This Court also will not

read into legislation, USERRA, that which Congress left out.

Therefore, taking action to enforce protection afforded under USERRA relates only to a formal enforcement action as provided in § 4323. The record does not show that Gagnon experienced retaliation for formally taking an action to enforce a protection of USERRA pursuant to § 4323. Gagnon did not file a complaint with the Secretary of Labor nor commence a civil action against Sprint PCS. Because Gagnon can not maintain a cause of action for retaliation under USERRA, the issue of whether the written reminder amounts to an adverse employment action is not decided. Sprint PCS' motion for summary judgment on Count II is granted.

C. Title VII and MHRA Discrimination Claim

Gagnon moves for summary judgment on Counts III and IV based on a statement made by Mendenhall while reviewing Gagnon's request for a near-fifty percent raise in pay. Sprint PCS counters that summary judgment is improper (1) because a jury must decide the credibility and truthfulness of the statement and (2) because Sprint PCS has a legitimate non-discriminatory basis for denying Gagnon's raise.

A claimant in a reverse discrimination case, in order to present a prima facie case, must show that background circumstances exist that support the suspicion that the defendant is that unusual employer who discriminates against the majority. See Duffy v. Wolle,123 F.3d 1026, 1036 (8th Cir. 1997) (citing Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir.1985)). However, even if a plaintiff is unable to show background circumstances to "trigger" the McDonnell Douglas presumption that does not necessarily mean he wasn't intentionally discriminated against. Id. (citing Notari v. Denver Water Dep't, 971 F.2d 585, 590 (10th Cir.1992)). If the plaintiff can present direct

evidence of intentional discrimination then he "should be permitted to proceed beyond the prima facie case stage of litigation." Id.

Under the burden-shifting test for direct evidence, once a plaintiff establishes direct evidence of discrimination, "the burden then shifts to the employer to show, by a preponderance of the evidence, 'that it would have made the same decision even if it had not taken the plaintiff's [race] into account.'" Ross, 2000 WL 1804354 *2 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 109 S. Ct. 1775, 1795, 104 L. Ed. 2d 268 (1989)).

The basis for Gagnon's Title VII and MHRA[14] reverse race and sex discrimination claims is a statement reported by Meredith-Ball, a plaintiff also in a Title VII discrimination case against Sprint PCS in the United States District Court for the Western District of Missouri. Meredith-Ball attended a meeting in Mendenhall's office to discuss the justification for Gagnon's new salary for the CBT Manager position. Pff's Suggestions, Exh. H: Meredith-Ball deposition. p. 76:10 - p. 77:22. During that meeting, Meredith-Ball reports, Mendenhall stated "I don't like your recommendation [regarding a fifty percent raise in pay for Gagnon]. I don't like compensation's recommendation. This is a white guy, isn't it? . . . Well, I don't have to pay him. I would only have to pay him this if he were a woman or a minority." Id. p. 82:17-25. Mendenhall then slid the recommendation back to Meredith-Ball and stated "He's just a white guy." Id. p. 83:1-6.

Sprint PCS argues in its opposition for summary judgment that "ample bias / impeachment evidence" exists, which will require a jury to decide the truthfulness of Meredith-Ball's statement

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[14] It is well established that "[c]ourts may look to Title VII principles for guidance when addressing statutory issues under [MHRA]." Vankempen v. McDonnell Douglas Corp., 923 F. Supp. 146, 149 (Mo. Ct. App. 1996); see Tart v. Hill Behan LumberCo., 31 F.3d 668, 671 (8th Cir. 1994).

(regarding Mendenhall's alleged "white guy" comments"). The "ample bias / impeachment" evidence includes Meredith-Ball's personal relationship with Gagnon, her own pending lawsuit against Sprint PCS, the lack of corroboration of Mendenhall's statement, the use of her name and Sprint PCS telephone number as a primary contact person for the EEOC (in the event that the EEOC could not contact Gagnon), threats that Meredith-Ball made against Wilder,[15] and Meredith-Ball's failure to address the "white guy" comment with the Human Resources department at Sprint PCS despite her previous practice. Sprint PCS argues that the bias and impeachment facts permit a jury to discredit Meredith-Ball's report of Mendenhall's statement and not find that direct evidence of discrimination exists. The facts presented by Sprint PCS show that a genuine issue exists for trial regarding Meredith-Ball's report of the Mendenhall statement. See Exeter, 58 F.3d at 1310 ("[the non-movant] must 'set forth specific facts showing that there is a genuine issue for trial.'") (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)); Dealer's Transport Co. v. Werner Transp. Co., 203 F.2d 549, 552 (8th Cir. 1953) ("inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury") (quoting Ellis v. Union Pacific R. Co., 329 U.S. 649, 653, 67 S. Ct. 598, 600, 91 L. Ed. 572).

In addition, Sprint PCS contends that it would not approve a fifty percent pay raise, under the same circumstances, regardless of the statement made by Mendenhall or Gagnon's race and sex. In order to show that it would have made the same decision had it not taken Gagnon's race and gender into account, Sprint PCS points to its company policy that raises should not exceed five percent of

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[15] Wilder states that Meredith-Ball threatened "if [Wilder] did not change the discipline to a verbal reminder that [Meredith-Ball] would sue [Wilder], and that [Meredith-Ball] would dig up a lot of mud on [Wilder], and that the sheriff would come and get [Wilder] and take [Wilder] away." Defs' Opposition, Exh. 9: Wilder deposition p. 292:7-12.

the employee's previous salary. And, a higher raise (more than five percent), up to twenty percent, can be awarded in "extraordinary circumstances." Def's Suggestions, Exh. B: Salary Management Guide p. 6. In addition, as shown by the affidavits of Moylan and Kurtze, every Sprint PCS employee charged with reviewing increases in pay, with the exception of Meredith-Ball, failed to approve or recommend the near-fifty percent raise. Moylan Affidavit ¶ 8; Kurtze Affidavit ¶ 6. Sprint has established by that it would not have made the same decision regarding Gagnon's raise in pay had it not taken his race and gender into account. Gagnon's motion for summary judgment on Counts III and IV is denied.

D. Motions to Strike

Gagnon also moves to strike the affidavits of Wilder, Moylan, Keenan, and Kurtze that Sprint PCS submitted with its opposition to Gagnon's summary judgment motion. Gagnon argues that deposition and interrogatory evidence shows that the affidavits in at issue are not based upon personal knowledge, are inadmissable opinion testimony, and, or, are false ("sham"). Sprint PCS responded that the affidavits are based upon personal knowledge, are not improper opinion testimony, and clarify or explain prior ambiguous testimony and responses, or less-than-clear testimony and responses, or explain any inconsistency.

A party is prohibited from creating genuine issues of material fact by submitting affidavits in support or opposition of summary judgment that contradict prior testimony or statements. See Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1364 (8th Cir. 1983) (comparing the holdings in Radobenko v. Automated Equipment Corp., 520 F.2d 540 (9th Cir. 1975) and Perma Research & Development Co. v. The Singer Co., 410 F.2d 572, 578 (2d Cir. 1969) with the decision

in Kennett-Murray Corp. v. Bone, 622 F.2d 887, 893 (5th Cir. 1980)). In Camfield, the Eighth Circuit ruled that absent an explanation of prior testimony or confusion in prior testimony that required an explanation, inconsistent affidavits are not permitted to create genuine issues of fact. Id. at 1364-65.

The Court does not find the affidavits submitted by Sprint PCS to be inherently inconsistent with prior testimony or statements. Unlike the facts in Camfield and the decisions discussed by the Eighth Circuit, the affidavits and prior testimony (and statements) brought to issue by Gagnon in his four motions do not raise new issues or theories of defense and do not contradict prior testimony by offering new facts to create a genuine issue(s) of material fact. The Court does not read Rule 56(e) to require an affidavit to follow prior lengthy deposition testimony verbatim. The affidavits closely follow prior testimony (and statements) and, or, explain incomplete or confusing testimony (and statements). Therefore, the Court denies Gagnon's motions to strike the affidavits of Kathleen Wilder, Julie Moylan, Arthur Kurtze, and Jim Keenan.

IV. CONCLUSION

Based on the foregoing, the Court hereby

GRANTS Plaintiff's Motion to Amend Motion for Summary Judgment and Suggestions in Support. The Court further

GRANTS Defendants' an extension up to, and including, October 16, 2000, to file its opposition to Plaintiff's summary judgment motion. All remaining motions regarding the time to file motions for or against summary judgment are dismissed as moot. The Court further

DENIES Plaintiff's motion to strike the affidavits of Wilder, Moylan, Keenan, and Kurtze.

The Court further

GRANTS Defendants' Motion for Partial Summary Judgment on Counts I and II. The Court further

DENIES Plaintiff's Motion for Summary Judgment on Count I. The Court further

DENIES Plaintiff's Motion for Summary Judgment on Counts III and IV.

IT IS SO ORDERED.

Dean Whipple
United States District Judge

Date 1-4-01

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WILLIAM E. GAGNON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99-0683-CV-W-1
	)	
SPRINT CORP., et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff William E. Gagnon ("Gagnon") filed this lawsuit against Defendant Sprint Corporation, d/b/a Sprint Spectrum L.P. ("Sprint Corporation") and Sprint Spectrum Finance Corporation d/b/a Sprint PCS ("Sprint PCS") (collectively, "Sprint") on July 20, 1999. Gagnon alleged five basic claims against Sprint involving: (1) discrimination under the Uniform Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301-33; (2) retaliation under USERRA; (3) race and gender discrimination under Title VII and the Missouri Human Rights Act ("MHRA") (alleging that he was discriminated when denied an approximate fifty percent raise); and (4) retaliation under Title VII and the MHRA. On January 4, 2001, the Court granted Sprint's motion for partial summary judgment on Gagnon's USERRA claims, leaving the Title VII and the MHRA discrimination and retaliation claims for trial. Trial on the remaining claims commenced on January 22, 2001, and on January 25, Gagnon concluded his evidence and rested his case. At that time, Sprint moved for the Court to enter judgment as a matter of law ("JAML") against Gagnon pursuant to Rule 50(a)(1). In moving for JAML, Sprint argued that Gagnon had not established a

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legally sufficient evidentiary basis for a reasonable jury to find for him on the following: (1) his race and gender discrimination claim under Title VII and the MHRA; (2) his retaliation claim under Title VII and the MHRA; (3) his claim for compensatory / emotional distress damages; and (4) his claim for punitive damages. After hearing arguments from counsel for Gagnon and Sprint, the Court granted Sprint's motion for JAML on Gagnon's Title VII and MHRA claims of race and gender discrimination and retaliation and follows with this Order.[1]

I. BACKGROUND

The following is not intend to be a complete recitation of all of the evidence at trial but is a synopsis for purposes of the present Order.

Sprint hired Gagnon, a white male, in March of 1997 to work as a curriculum developer in Sprint's training department (also known as the Training and Professional Studies department, or "TAPS"). Sprint paid Gagnon an annual salary of $44,100 with a short term incentive ("STI") of $3,000. The decision to hire Gagnon was made by Jim Keenan ("Keenan"), a manager in the TAPS department, (2) Kathleen Wilder ("Wilder"), the director of the TAPS department, and (3) Jim Mendenhall ("Mendenhall"), a vice president over the TAPS department. Prior to working for Sprint, Gagnon worked for a defense contractor, CUBIC Applications ("CUBIC"), following his retirement from the United States Army. The evidence presented at trial showed that Gagnon earned $42,000 a year at CUBIC.

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[1] Counsel for Sprint, John J. Yates and Joseph H. Knittig, submitted a proposed order to which counsel for Gagnon, Henry R. Cox, Don R. Lolli and Benjamin K. Byrd, were allowed to object. The Court, after considering the proposed order and objections, issues the present Order.

After he began working at Sprint in March 1997, Sprint created a new management position in the TAPS department known as CBT-Manager. Before the position was formally created, Wilder unofficially selected Gagnon to work as the CBT-Manager, which was scheduled to be financed, created, and filled in early 1998. In September and October of 1997, Wilder did not work at Sprint because of maternity leave. During the time of Wilder's maternity leave, another manager of the TAPS department, Lynn Meredith-Ball ("Meredith-Ball"), assisted in handling Wilder's director duties.[2] The evidence also showed that during the same time period, and extending to the end of 1997, Sprint PCS was in a hiring freeze. Despite the hiring freeze and Wilder's absence, Mendenhall accelerated the creation of the CBT-Manager position and directed that Gagnon be promoted into the position in October of 1997.

Upon the creation of the CBT-Manager position, Sprint Human Resource Department ("HR") set a "market reference point" ("MRP") for the position. The MRP is a targeted reference point, or guide, for a tenured employee in that position. The MRP is not a guaranteed salary point. The MRP for the curriculum developer position was $42,000, with an STI of $3,000. The MRP for the CBT-Manager position was $66,000, with an STI of $9,500. Accordingly, at the time of his promotion, Gagnon was moving from a position with a base salary MRP of $42,000 to a job with a base salary MRP of $66,000.

The evidence introduced at trial also showed that a Sprint policy governed the raise an employee was eligible to receive upon a promotion (the "Promotion Policy"). However, both

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[2] In his objections to the proposed order, Gagnon argues that in Wilder's absence Meredith-Ball was named co-director of the TAPS department and was charged with authority concerning compensation issues. The Court is not concerned with the title that Meredith-Ball held but recognizes her duties included temporarily assisting with the position left vacant while Wilder took maternity leave.

Gagnon and Meredith-Ball testified that they were unaware of the Promotion Policy at the time of Gagnon's promotion in October of 1997. The Promotion Policy found in Sprint's "Salary Management Guidelines," stated:

> When an employee's base salary after merit pay consideration is below the market reference point for the new position, a promotional increase of 5% may be granted if the promotion is within a normal progression (i.e. analyst to senior analyst). For "extraordinary" promotional increases between positions, the maximum total increase should not exceed 20%. Please note: promotional increases greater than 10% must be reviewed and approved by the appropriate Chief Officer or their designee.

Sprint's Exhibit 74, p. 13, Promotion Policy (also contained in Plaintiff's Exhibit 43). Under the Promotion Policy, and as Gagnon, Meredith-Ball, and Julie Moylan ("Moylan") all agreed, the "Chief Officer or [his] designee" was the decision maker on an employee pay increase above ten percent. As a matter of process, in seeking a salary increase greater than ten percent, a Compensation Exception Request form stating the amount of the raise requested is completed, sent to HR for a recommendation, a vice president in charge of the department for a recommendation and, lastly, to the "Chief Officer or [his] designee" to review all recommendations and make the decision on the salary increase.

In the present case, Plaintiff's Exhibit 10 was the Compensation Exception Request form that resulted in Gagnon's receiving an eleven percent raise upon his promotion in October of 1997. According to the evidence, Kurtze was the decision maker for that raise. However, before Kurtze made that decision, Meredith-Ball prepared and submitted a form requesting an immediate eleven percent raise for Gagnon with an additional ten percent raise after six months, which Mendenhall supported. Although agreeing with the immediate eleven percent raise, Moylan, who reviewed the

Compensation Request Forms for the HR recommendation component of the Promotion Policy process, "strongly disagree[d]" with the additional ten percent request. (emphasis in original) Instead of approving in advance the additional raise, Moylan recommended that Sprint award Gagnon an eleven percent raise and allow him to seek a ten percent raise in six months, which would be dependant upon performance. Thus, there were two recommendations before Kurtze: (1) the eleven percent raise and ten percent automatic increase following six months that Meredith-Ball and Mendenhall recommended; and (2) the eleven percent recommendation from Moylan. Kurtze rejected the recommendation of Meredith-Ball and Mendenhall and approved Moylan's recommendation to only award Gagnon an immediate eleven percent increase. The evidence showed that Kurtze's decision to only approve an immediate eleven percent raise complied with the Promotion Policy.

Further evidence was introduced that Gagnon received an additional salary increase of fifteen percent in January of 1998. And, three months after the fifteen percent raise, in April of 1998, Gagnon received a two percent merit salary increase. In summary, the evidence introduced at trial showed that over a period of approximately six months Gagnon's base salary increased from $44,100 to $58,735 (an increase of thirty-three percent). And, Gagnon's STI increased from $3,000 to $9,500 (an increase of more than 200 %).

Despite the uncontroverted evidence set forth above, Gagnon claimed that his October 1997 pay raise was the product of race and gender discrimination. Specifically, Gagnon complained because he did not receive an immediate raise from $44,100 to $66,000 (an increase in pay of approximately fifty percent to the full MRP for his position) upon his promotion in October of 1997. The basis for Gagnon's race and gender discrimination claim follows.

Prior to submitting the eleven percent Compensation Exception Request form[3] during Wilder's maternity leave, Meredith-Ball initiated an effort[4] to increase Gagnon's salary approximately fifty percent[5] during a hiring freeze at Sprint. Meredith-Ball completed a Compensation Exception Request form[6] in order to increase Gagnon's salary from $44,100 to the full MRP of $66,000 and the $9,500 STI. Meredith-Ball testified that she personally delivered the fifty percent compensation request to Mendenhall at his office to receive his recommendation. According to Meredith-Ball, Mendenhall refused to support her recommendation and remarked that Gagnon "was just a white guy," and "that if he was a woman or a minority then Sprint would have to pay him."[7]

The evidence at trial did not show that Meredith-Ball submitted the fifty percent raise request to Kurtze, the decision maker, for approval. And, no evidence was submitted to show Kurtze had knowledge of the Mendenhall "white guy" remark when he made his decision regarding Gagnon's

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3 Plaintiff's Exhibit 10, supra.

4 The parties dispute whether Wilder directed the action or whether Meredith-Ball took the action on her own initiative. The distinction is lost upon the Court but, for reasons unknown, is a matter of great importance to the two parties.

5 Gagnon objects to the use of "fifty percent" in the proposed order. Instead, Gagnon argues that Meredith-Ball's testimony states that the request was a thirty-three percent "base-to-base" increase using a calculation provided by Wilder and HR. And, Gagnon argues, the proposed order omits Sprints admission that the proposal "constituted a [thirty-five percent] increase. Plaintiff's Trial Exhibit 95."

Once again, the semantics of different terms or language used by both parties is not understood and severely frustrates the Court. The Court's math finds the increase from $44,000 to $66,000 is $22,000, or half of $44,000. Arguments by each party's counsel regarding this type of diminutive issue plagued the litigation of this matter. The Court believes the argued issues were not in the best interest of each counsel's client but instead were the result of the animosity existing between opposing counsel. Whether "fifty," "thirty-three," or "thirty-five" percent is used does not alter the actions taken by Meredith-Ball, Gagnon, Mendenhall, or Kurtze, and, as such, will not be addressed further in this Order.

6 Plaintiff's Exhibit 9.

7 At the same time that he rejected the fifty percent request recommended by Meredith-Ball, Mendenhall rejected a twenty-five percent increase recommended by Moylan of HR. See Plaintiff's Exhibit 9.

eleven percent pay raise. Instead, the evidence showed Meredith-Ball revised the Compensation Exception Request form to make a request[8] within the SMG's Promotion Policy. As previously addressed in this Order, Kurtz did not approve the initial request even though it possessed Mendenhall recommendation but instead favored a flat eleven percent raise.

Subsequently, on April 21, 1998, Gagnon filed a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC") contending that his eleven percent raise was the product of race and gender discrimination.

Approximately five months following the filing of his Charge, the "porch incident" occurred. Specifically, at approximately 2:00 p.m. on August 7, 1998, Gagnon and Meredith-Ball organized a "meeting" or "discussion" with four employees in the TAPS department on the outside porch of the Sprint building. The employees gathered to meet with Gagnon and Meredith-Ball were Cory Aylor ("Aylor"), Bill Pearce ("Pearce"), Steve Hammack ("Hammack") and Brian Schlaak ("Schlaak"). These employees were new employees at Sprint PCS, having worked at Sprint for less than six months. The four employees, who were military veterans and friends of Gagnon, were recruited to Sprint by Gagnon and ultimately hired into the organization by Wilder. The evidence introduced at trial revealed that Gagnon and Meredith-Ball called these employees out of work and to a patio, or porch, in front of the Sprint building to inform the employees about transferring to potential jobs outside of Wilder's department.[9]

Following the porch discussion, two managers in the TAPS group, Dale Coffman ("Coffman")

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[8] The previously discussed eleven percent raise and automatic ten percent raise after six months.

[9] The evidence introduced at trial showed that Sprint had a policy that prevented employees from transferring, without approval from their department head, until they had been with the company for at least a year.

and Keenan, contacted Wilder to advise her about the porch incident. They reported to Wilder that Gagnon and Meredith-Ball met with four employees out of the workplace and told them that she (Wilder) was uncomfortable with the number of military employees in the department and they could not advance in the TAPS group under her. Gagnon and Meredith-Ball advised the four employees that they needed to look outside the TAPS group if they were interested in advancement opportunities. Because the reports concerned Wilder, she decided to investigate the porch incident along with Kim Klosak ("Klosak") from HR.

In investigating the porch incident, Wilder and Klosak interviewed all four individuals who met on the porch along with Gagnon and Meredith-Ball. Both Pearce and Aylor reported that Gagnon and Meredith-Ball, together,[10] told the four employees that Wilder was uncomfortable with the number of military employees in the department and, therefore, they could not advance in the TAPS group under Wilder and should look outside the TAPS group if they were interested in advancement opportunities. Hammack reported that he did not hear Gagnon and Meredith-Ball make such comments but he was not paying attention to what was being discussed. But, Hammack confirmed that before the porch incident, Meredith-Ball told him Wilder was uncomfortable with the number of military in the department. Schlaak arrived to the porch approximately 10-15 minutes late and missed most of the Gagnon and Meredith-Ball discussion. At trial, Gagnon and Meredith-Ball denied making the statements discussed above and maintained that they were merely sharing job

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[10] Gagnon objects that the testimony of Wilder and Klosak failed to determine who made the comments. Of the four individuals summoned outside the Sprint building by Gagnon and Meredith-Ball, the Court notes that evidence shows that at least one individual did not hear Gagnon or Meredith-Ball make any comments and others attribute the comments to one or both (Meredith-Ball and Gagnon). The Court also notes that the only evidence of the comments not being made was testimony by Meredith-Ball and Gagnon.

opportunities with the four individuals.

As a result of the investigation, and with the recommendation of Klosak, Wilder issued a "written reminder"[11] to Gagnon and Meredith-Ball. The impact of the reprimand was a temporary placement of the written reminder in Gagnon's personnel file for six months and a prohibition on transfers to other jobs within Sprint for six months without first securing vice-presidential approval.[12] During his cross-examination at trial, Gagnon affirmatively admitted that he did not lose any pay[13] or other benefits of employment as a result of the written reminder. The evidenced showed that Gagnon maintained the same job position, was not demoted or suspended and did not suffer a material employment disadvantage.[14] The written reminder for the "porch incident" expired after six months.

Gagnon also testified some coworkers were cold towards him. Specifically, Gagnon claims Wilder called him a "white guy" on two occasions and was not as nice to him after her maternity

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[11] The evidence showed that a "written reminder" is a formal reprimand at Sprint.

[12] Pursuant to the prohibition, Sprint refused to allow Gagnon to apply for a promotion or transfer while the written reminder was in effect. Plaintiff's Exhibits 50 and 305.

[13] Gagnon objects that he did not receive a ten percent raise "assur[ed]" to him by Wilder. Given the conduct of Gagnon and Meredith-Ball in the "porch incident," the Court does not find the failure to award an "assured" raise a loss in pay.

[14] Gagnon testified that during the six month period, he asked Wilder to exempt him from the written reminder so he could pursue a potential lateral transfer to another job in October of 1998. Wilder did not excuse him from the written reminder. Gagnon admitted that he knew nothing about the job, and did not even know if the job was filled. Wilder, on the other hand, testified that the job at issue was not even an open, available job. In other words, there was no lateral job for Gagnon to which he could have successfully applied. In addition, Gagnon testified that he thought that during the time frame of the porch incident, he deserved yet another ten percent raise because Wilder told him in January of 1998 that she would consider going for another ten percent raise for him. On cross-examination, however, Gagnon admitted that he was not entitled to another ten percent raise, and that Wilder never "guaranteed" him such a raise. See supra n.13.

leave. In addition to Wilder, Gagnon also claims some other coworkers were not as nice to him as they once were, but only specifically identified Keenan at trial. According to Gagnon, Keenan did not socialize with him, did not say "hello" to him in the hallway and would talk to employees that worked under Gagnon without first going to Gagnon. At trial, Gagnon claimed the written reminder, ostracism by his coworkers and failure to award him an additional ten percent raise were all forms of retaliation in response to his filing a Charge with the EEOC. But, Gagnon did not offer any evidence to causally link the written reminder and his differences with his coworkers to his Charge. In fact, with respect to his coworkers, Gagnon testified that he had no evidence that his fellow employees even knew that he filed his Charge.

II. JAML STANDARDS

In considering a motion for JAML, as when considering a motion for summary judgment, the appropriate inquiry is: "'[w]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Kinserlow v. CMI Corp., 217 F.3d 1021, 1025 (8th Cir. 2000) (upholding a district court's motion for judgment as a matter of law at the close of all of the evidence) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Rule 50(a) allows the trial court to enter JAML "'[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party. . . .'" Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1049 (8th Cir. 2000) (reversing lower court's entry of jury verdict and entering judgment as a matter of law) (citing Fed. R. Civ. P. 50(a)(1)). In viewing the evidence, the court "'must assume all facts that the nonmoving party's

evidence tends to show, give [him] the benefit of all reasonable inferences, and assume that all conflicts in the evidence were resolved in [his] favor.'" Concord, 207 F.3d at 1049-50 (quoting Hathaway v. Runyon, 132 F.3d 1214, 1220 (8th Cir. 1997)).

However, when considering a motion for JAML, the nonmoving party is entitled only to the benefit of "reasonable" inferences. Gill, 217 F.3d at 1025. A "reasonable" inference is one that "may be drawn from the evidence without resort to speculation." Id. (citations omitted). When the non-movant's case rests solely on speculation and conjecture without any evidentiary support, JAML must be granted. Concord, 207 F.3d at 1050. While entitled to all supporting inferences, the nonmoving party is not given "'the benefit of unreasonable inferences or those at war with the undisputed facts.'" Id. (quoting Sip-Top, Inc. v. Ekco Group, Inc., 86 F.3d 827, 830 (8th Cir. 1996). "'[T]he court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses.'" Gill, 217 F.3d at 1025. Thus, JAML must be granted if there can be but one reasonable conclusion as to the verdict when considering the evidence. Concord, 207 F.3d at 1050.

III. DISCUSSION

A. JAML – RACE / GENDER DISCRIMINATION CLAIM

Gagnon's Title VII and MHRA claim of discrimination based on his gender, male, and race, Caucasian ("white") is commonly referred to as a reverse discrimination claim. In reverse discrimination cases, the plaintiff must present evidence to demonstrate the employer is "that unusual employer who discriminates against the majority." Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir.

1997) (quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985).[15]

The evidence relied upon by Gagnon for his reverse discrimination claim was an alleged comment made by Mendenhall that "he (Gagnon) is just a white guy." In addition to the Mendenhall comment, the following evidence was also introduced at trial: the fifty percent raise submitted by Meredith-Ball was excessively greater than the permissible raises under Sprint's Promotion Policy; and Gagnon received raises that were within the Promotion Policy.[16] As previously stated, Mendenhall made the comment while rejecting a recommended fifty percent raise of Gagnon's salary. Gagnon argued at trial that the Mendenhall comment was direct evidence for his reverse discrimination claim. However, the comment, even if made, does not automatically cause Gagnon's reverse discrimination case to be a Title VII / MHRA direct evidence claim.

In order for the Mendenhall comment to be received as direct evidence, Gagnon, must show that Mendenhall was (1) a decision maker and (2) the comment reflected a discriminatory animus such that a jury could infer it was a motivating factor in the decision at issue. "Statements may constitute evidence of impermissible motive only when they are made by decisionmakers in the [decisionmaking] process and reflect a discriminatory animus such that a jury could infer it was a motivating factor in the [decisionmaking] process." Herrero v. St. Louis Univ. Hosp., 109 F.3d 481, 484 (8th Cir. 1997);

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[15] See also Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986) ("When a plaintiff who is a member of a favored group alleges disparate treatment, the courts have adjusted the prima facie case to reflect this specific context by requiring showing of 'background circumstances [which] support the suspicion that the defendant is that unusual employer who discriminates against the majority.'") (citations omitted).

[16] Under the Promotion Policy, which was not disputed, a five percent raise upon promotion was the general rule. Gagnon received two "exceptions" from the general rule which he admitted were "out of the norm" (his eleven percent raise in October of 1997, and his fifteen percent raise in January of 1998).

see also Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426 (8th Cir. 1999) ("Not all comments that may reflect a discriminatory attitude are sufficiently related to the adverse employment action in question to support such an inference. For example, 'stray remarks in the workplace,' 'statements by nondecisionmakers,' or 'statements by decisionmakers unrelated to the decisional process itself' will not suffice.") (citations omitted).

The evidence introduced at trial revealed that Kurtze, and not Mendenhall, was the decisionmaker for Gagnon's October 1997 raise and potential fifty percent raise.[17] The testimony of witnesses, including Gagnon and Meredith-Ball, and according to the plain language of the Promotion Policy, Kurtze was vested with the exclusive authority to decide Gagnon's raise. In fact, according to the evidence, Kurtze refused to approve Mendenhall's recommendation[18] that Gagnon receive an immediate eleven percent raise (in October of 1997) and an automatic ten percent raise after six months. Instead, Kurtze only approved an eleven percent raise. Armed with recommendations and choices, Kurtze made his independent decision. Significantly, no evidence was introduced that Kurtze knew of the Mendenhall comment or acted on it. Accordingly, there was no evidence to link a comment by a nondecisionmaker, Mendenhall, to the decision made by Kurtze.

The fact that Kurtze was the decision maker and not Mendenhall does not end the Court's direct evidence analysis. Proper supporting evidence of statements or evidence of individuals beneath the decisionmaker can constitute evidence of discrimination. See Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051, 1056-60 (8th Cir. 1993). In cases like Kientzy, if the evidence shows that an

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[17] Among other witnesses, Gagnon and Meredith-Ball admitted this fact at trial.

[18] The evidence introduced at trial showed that recommendations for Gagnon's salary increase were made by Meredith-Ball, Moylan and Mendenhall.

innocent decisionmaker was merely the "conduit," or "cat's paw," of another's prejudice, then a non decisionmaker's statement or conduct could conceivably support a discrimination claim. See id. at 1060. But, the conduit situation was not present in this case. There was no evidence that Mendenhall acted upon a bias against white men by refusing to recommend a fifty percent raise for Gagnon or evidence that Mendenhall used Kurtze, the decision maker, as a mere "conduit." Indeed, the evidence was quite to the contrary as Kurtze rejected Mendenhall's recommendation of an immediate eleven percent raise with an automatic ten percent raise after six months. Unlike Kientzy and other similar cases, there was no evidence that the decisionmaker essentially acted as a "rubber stamp" for Mendenhall. The Court finds that a reasonable jury could not conclude that Kurtze would approve a fifty percent raise when he would not approve an immediate eleven percent raise with an automatic ten percent raise after six months.

Because the evidence introduced at trial is not "direct evidence," Gagnon must proceed to use background circumstances as evidence to show Sprint is the unusual employer who discriminates against the majority. In Duffy, the Eighth Circuit adopted the analysis first used by the Murray court in which the Sixth Circuit stated:

> [i]n our view, the "reverse discrimination" complainant bears the burden of demonstrating that he was intentionally discriminated against "despite his majority status." [citation omitted]. We agree with the district court that a prima facie case of "reverse discrimination" is established upon a showing that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority;" [citations omitted] and upon a showing that the employer treated differently employees who were similarly situated but not members of the protected group. [citation omitted].

Murray, 770 F.2d at 67.

In the present case, Gagnon failed to offer sufficient background circumstances that Sprint is the unusual employer who discriminates against the majority. The evidence showed Sprint hired Gagnon into a training department that was approximately ninety-five percent white and fifty percent male. At the time of his hiring, Gagnon's fellow managers (Meredith-Ball, Rodgers, Snyder, Keenan and Coffman) were white and three were men. And, within the predominately white male department, Sprint promoted Gagnon six months after he started (by Wilder, a white female, and Mendenhall, a white male) and rewarded him with an eleven percent raise (by Kurtze, also a white male). And, most significant, Gagnon did not offer evidence that any similarly situated minorities or female employees were treated differently than him.

Thus, Mendenhall's comment is not direct evidence of reverse discrimination. And, Gagnon did not produce any background evidence, including evidence that similarly situated individuals outside of Gagnon's class were provided preferential treatment, to show that Sprint is the unusual employer who discriminates against the majority. Therefore, Gagnon's reverse discrimination Title VII and MHRA claims fail as a matter of law and, accordingly, the Court entered JAML for Sprint.

B. JAML – PLAINTIFF'S RETALIATION CLAIM

To establish a prima facie retaliation claim, Gagnon had to prove that: (1) he engaged in a protected activity; (2) Sprint subsequently took an "adverse employment action" against him; and (3) the adverse action was causally linked to his protected activity. See Scusa v. Nestle U.S.A. Company, Inc., 181 F.3d 958, 968 (8th Cir. 1999) (setting forth elements of a retaliation claim). As a matter of law, Gagnon failed to establish an evidentiary foundation to support the second or third elements of his claim, warranting JAML for Sprint.

"While actions short of termination may constitute an adverse employment action [sic] within the meaning of the statute, 'not everything that makes an employee unhappy is an actionable adverse action.'" Manning v. Metro. Life Ins. Co., Inc., 127 F.3d 686, 692 (8th Cir. 1997) (quoting Montandon v. Farmland Indus. Inc., 166 F.3d 355, 359 (8th Cir. 1997)). "An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." Spears v. Mo. Dept. of Corr. & Human Resources, 210 F.3d 850, 853 (8th Cir. 2000). "Employment actions which do not result in changes in pay, benefits, seniority, or responsibility are insufficient to sustain a retaliation claim." Buettner v. Arch Coal Sales Co., Inc., 216 F.3d 707, 715 (8th Cir. 2000).

At trial, Gagnon alleged two types of alleged retaliation: (1) his August 1998, written reminder;[19] and (2) alleged ostracism by his co-workers. Viewing the evidence in the light most favorable to Gagnon, he failed to establish that either of these actions rose to the level of actionable retaliation under controlling Eighth Circuit authority.

It is established precedent in the Eighth Circuit that an admonishment to an employee is not actionable retaliation. See Flannery v. Trans World Airlines, Inc., 160 F.3d 425, 427-28 (8th Cir. 1998) (finding reprimands and alteration of an employee's personnel file not adverse employment action). In Flannery, the plaintiff alleged retaliatory actions of a change in work hours, reassignment to a different work station, various reprimands and the removal of roughly 300 complimentary letters and commendations from her personnel file. Id. at 427. However, similar to Gagnon, the plaintiff in Flannery presented no evidence that any of those actions resulted in a reduction in pay, benefits, seniority and the like. Id. at 428. Accordingly, the lower court held that the alleged retaliatory

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[19] For purposes of this Order, the written reminder includes all terms and conditions contained in the written reminder policy. Specifically, the prohibition on promotions or transfers without approval of a vice-president is treated as part of the written reminder, as a whole.

actions were not actionable because "there was no showing that they caused any significant disadvantage to Flannery" and the Eighth Circuit affirmed the summary judgment ruling in favor of the employer.[20] Id.

In the case at bar, Gagnon did not offer evidence that he suffered a materially adverse employment action and admitted the written reminder caused him no such harm. Specifically, he testified that he did not lose any pay or other benefits of employment as a result of the written reminder. Based on the controlling authority of Flannery, Gagnon failed to establish that the written reminder constituted actionable retaliation as a matter of law.

Similarly, it is well settled in the Eighth Circuit that ostracism and rudeness by co-workers does not rise to the level of an adverse employment action. See Manning, 127 F.3d at 693 (hostility and ostracism by supervisor did not rise to the level of an actionable employment action). In Manning, the plaintiffs' supervisor constantly talked about his sex life in graphic detail, fondled his genitals and asked female employees for sexual favors. Id. at 688. The plaintiffs complained to management about that conduct and in response the supervisor threatened to kill at least one of the plaintiffs and told her that his behavior was not to be questioned. Id. at 688-89. The plaintiff claimed the supervisor's threat was actionable retaliation and survived JAML at the trial level and was awarded a $275,000 jury verdict. On appeal, the Eighth Circuit reversed and entered JAML against the plaintiff on her retaliation claim, holding such hostility and ostracism by her supervisor did not rise

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[20] Numerous Eighth Circuit opinions echo the holding in Flannery. See, e.g., Spears, 210 F.3d at 854 (affirming summary judgment; rejecting plaintiff's claims that job transfer and poor job evaluation constituted actionable adverse employment actions); Scusa, 181 F.3d at 968-69 (affirming summary judgment; cataloging Eighth Circuit authority holding that actionable adverse action requires a material employment disadvantage or an ultimate employment decision, such as termination); Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (affirming summary judgment, and holding that reassignment to more stressful, tedious job that pays the same and has the same benefits is not an actionable employment action, and is "nothing more disruptive than a mere inconvenience or an alteration of job responsibilities").

to the level of an actionable employment action. Id. at 693; see also Scusa, 181 F.3d at 968-70 (holding that snide remarks and ostracism did not constitute actionable retaliation).

The conduct that Gagnon alleges in the present case is less significant when compared to the evidence in Manning and Scusa. For example, Gagnon testified, inter alia, that Keenan would not say "hello" to him and would not look at him when they passed in the hallway. Thus, as a matter of law, Gagnon failed to establish that his alleged differences, or ostracism, with his co-workers rose to the level of actionable retaliation by Sprint.

In addition, Gagnon did not introduce evidence that co-worker ostracism was causally linked to his complaints to the EEOC and MHRC. "Title VII protection from retaliation for filing a complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with peers." Comstock v. Consumers Markets, Inc., 953 F.Supp. 1096, 1104 (W.D. Mo. 1996) (quoting Valdez v. Mercy Hosp., 961 F.2d 1401, 1403 (8th Cir. 1992)). Thus, in order to create a prima facie retaliation claim, Gagnon had to prove the alleged retaliatory actions that he complains about were causally linked to his protected activity. See Herrero, 109 F.3d at 484 (holding that plaintiff failed to prove that alleged mistreatment by other employees was causally linked to alleged retaliation).

In regard to Gagnon's claims that his coworkers were cold towards him, he did not offer any evidence that the treatment was linked to his Charge. In fact, Gagnon testified he kept the issue to himself and did not have any reason to believe his coworkers knew about the Charge with the exception of Meredith-Ball, whom he discussed the Charge with and who is also a plaintiff against Sprint in a discrimination lawsuit.

In summary, Gagnon did not offer evidence to link his written reminder and differences with coworkers to his Charge. Instead, Gagnon wanted the Court and the jury to second-guess Wilder's

business judgment (for issuing the written reminder) and the reasons why he and some of his fellow employees did not get along. Because "[f]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions," Kneibert v. Thomson Newspapers, Michigan Inc., 129 F.3d 444, 454 (8th Cir. 1997) (quoting Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 973 (8th Cir. 1994)), Gagnon's claims of retaliation fail as a matter of law and the Court entered JAML in favor of Sprint.

IV. CONCLUSION

In the case at bar, Gagnon did not introduce sufficient evidence to show as a matter of law that Sprint was the unusual employer who discriminates against the majority in support of his claim of race and gender discrimination. In addition, the introduced evidence was insufficient to support Gagnon's retaliation claim. Based on the foregoing, the Court hereby

GRANTS Sprint's motion for **JUDGMENT as A MATTER of LAW** on Gagnon's claim of race and gender discrimination in violation of Title VII and the MHRA. The Court further

GRANTS Sprint's motion for **JUDGMENT as A MATTER of LAW** on Gagnon's claim of retaliation as a result of filing a complaint with the EEOC and MHRC and in violation of Title VII and the MHRA. The Court further

DISMISSES all remaining claims as moot.

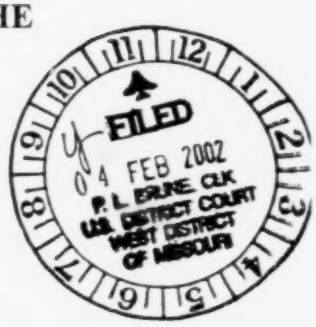
IT IS SO ORDERED.

Dean Whipple
United States District Judge

Date 5-10-01

C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION



WILLIAM E. GAGNON,)
)
Plaintiff,)
)
v.) No. 99-0683-CV-W-1
)
SPRINT CORPORATION, et al.,)
)
Defendants.)

ORDER

Pending before the Court is Defendants' application for attorneys' fees and suggestions in support, and Defendants' first and second supplement to the application for fees. Other related documents consist of Plaintiff's opposition to the motion for attorneys' fees, Defendants' reply, Plaintiff's further response, Defendants' reply to the further response, Plaintiff's motion to strike Defendants' reply brief, Plaintiff's surreply, and Plaintiff's motion to defer ruling on the motion for attorneys' fees and brief comments on daily timesheets. Plaintiff's Title VII and Missouri Human Rights Act ("MHRA") reverse discrimination and retaliation claims proceeded to trial in January 2001. The Court granted Defendants' motion for judgment as a matter of law. Defendants request that pursuant to Federal Rule of Civil Procedure 54(d)(2), 42 U.S.C. § 2000e-5(k), and Mo. Rev. Stat. § 213.111(2), the Court declare them prevailing parties on Plaintiff's reverse discrimination and retaliation claims and award Defendants $75,000 as reasonable attorneys' fees incurred in defending against these claims. The Court has considered carefully the arguments presented by the parties. For the following reasons, the Court GRANTS Defendants' application for attorneys' fees in the amount of $75,000.

DOCUMENT # 180

56,178

DISCUSSION

Defendants request an award of $75,000 in attorneys' fees and costs. Plaintiff contends that the Defendants are not entitled to fees. The Court may award attorneys' fees to a Defendant that prevails on a Title VII claim. 42 U.S.C. § 2000e-5(k); Coleman v. General Motors Corp., 667 F.2d 704 (8th Cir. 1981)(awarding fees to a prevailing defendant). A prevailing defendant is entitled to an award of attorneys' fees under the MHRA when the claims against it are "without foundation." Mo. Rev. Stat. § 213.111(2). The same standards govern fee awards under Title VII and the MHRA. See Hartig v. Professional Laundry Management Systems, Inc., 33 F. Supp. 2d 817 (E.D. Mo. 1999). To award fees, the Court must find that Plaintiff's claims were "frivolous, unreasonable, or groundless, or that (he) continued to litigate after it clearly became so." Coleman, 667 F.2d at 707 (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)). Even if Plaintiff contends that he filed his claims in good faith, that does not preclude an award of attorneys' fees. See Tang v. State of Rhode Island, 163 F.3d 7 (1st Cir. 1998). If the case is one that "should never have been filed," an award of attorneys' fees is appropriate. Hoover v. Amco, Inc., 691 F.Supp. 184 (W.D. Mo. 1988)(awarding prevailing defendant attorneys' fees).

Plaintiff sued Defendants for reverse discrimination because he did not receive a raise that exceeded the limit of Sprint PCS' promotion policy. Plaintiff, a white man, was hired by white men and a white woman, received a promotion from a white man and a white woman, and received pay increases and incentive compensation. Plaintiff failed to offer credible evidence at trial to meet his burden of proving reverse discrimination. Instead, his claim hinged on Lynn Meredith-Ball's statement that she heard a non-decision maker and a white man refer to Plaintiff as a "white guy." Plaintiff also failed to prove that he was retaliated against. Thus, the Court granted Judgment as a

Matter of Law for Defendants. Plaintiff's claims were frivolous and groundless, and the Court declares that Defendants are the "prevailing party," and are entitled to attorneys' fees.

Defendants seek reimbursement for time spent defending this case, both at Bryan Cave and Husch & Eppenberger. While the case was handled at Bryan Cave, Plaintiff had four claims pending: reverse discrimination under Title VII and the MHRA; retaliation under Title VII and the MHRA; military discrimination under USERRA; and retaliation under USERRA. Defendants recognize that attorneys' fees are not recoverable on Plaintiff's USERRA claims, which were two of four claims. Thus, Defendants seek reimbursement for only half of the time spent while the case was handled at Bryan Cave, which amounts to $46,229.12 in fees.

Mr. Yates moved from Bryan Cave to Husch & Eppenberger on August 25, 2000, and after this time fees were incurred at this firm. From August 25, 2000 until January 4, 2001, Plaintiff still had four claims pending. Because attorneys' fees are not recoverable in two of the claims, the Defendants seek reimbursement for half of the time spent on this matter between these dates, which amounts to $50,539.75. On January 4, 2001, the Court granted Defendants' motion for partial summary judgment, eliminating the USERRA claims. From that point through trial and preparation of the proposed JMOL order, Defendants seek reimbursement for all of the time spent on this case, which totals $63,928.50. Thus, the total amount sought by Defendants is $160,697.37.

However, because Defendants understand that Plaintiff does not have unlimited resources, Defendants request only $75,000 in attorneys' fees. Plaintiff disputes that Defendants are entitled to attorneys' fees and requested that this Court order Defendants to produce billing records supporting Defendants' supplement to the application for fees. (Plaintiff's surreply, Doc. No. 175). The Court issued such an order on November 27, 2001, and Defendants submitted their billing records.

After a review of the pleadings and billing records, and after taking into account the complexity of this case and skill of the attorneys', the Court finds that Defendants' request for $75,000 in attorneys' fees is reasonable.

CONCLUSION

Based on the foregoing, the Court hereby

GRANTS Defendants' application for attorneys' fees. The Court

AWARDS Defendants $75,000 in attorneys' fees.

IT IS SO ORDERED.

Dean Whipple
United States District Judge

Date 2-4-02

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WILLIAM E. GAGNON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 99-0683-CV-W-1
	)	
SPRINT CORPORATION, et al.,	)	
	)	
Defendants.	)	

ORDER

Pending before this court is a joint relief from judgment signed by all parties, filed July 1, 2002. In an order dated February 4, 2002, this Court awarded fees and expenses to the Defendant as the prevailing party in the underlying case. On March 19, 2002, the Court of Appeals issued its opinion in *Gagnon v. Sprint Corporation,* Case No. 01-2505, which reversed the District Court's order granting judgment as a matter of law on Plaintiff's claim of "reverse discrimination" and remanded the case to the District Court for further proceedings. The parties state and agree that, given the present procedural posture of this case, the order of this Court entered February 4, 2002 should be vacated.

Pursuant to Federal Rule of Civil Procedure 60(b), the District Court's order entered February 4, 2002 is vacated and Plaintiff is granted relief from such judgment.

IT IS SO ORDERED.

Dean Whipple
United States District Judge

Date July 15, 2002

DOCUMENT # 184

83

38 § 4301. Purposes; sense of Congress

(a) The purposes of this chapter are–

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

38 § 4303. Definitions

For the purposes of this chapter–

(1) The term "Attorney General" means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under this chapter.

(2) The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

(3) The term "employee" means any person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of section 4319(c) of this title.

(4)(A) Except as provided in subparagraphs (B) and (C), the term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including–

(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;

(ii) the Federal Government;

(iii) a State;

(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and

(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

(B) In the case of a National Guard technician employed under section 709 of title 32, the term "employer" means the adjutant general of the State in which the technician is employed.

(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (> 29 U.S.C. 1002(2)) shall

be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.

(5) The term "Federal executive agency" includes the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5, and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department.

(6) The term "Federal Government" includes any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States.

(7) The term "health plan" means an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(8) The term "notice" means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.

(9) The term "qualified", with respect to an employment position, means having the ability to perform the essential tasks of the position.

(10) The term "reasonable efforts", in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer.

(11) Notwithstanding section 101, the term "Secretary" means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.

(12) The term "seniority" means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.

(13) The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

(14) The term "State" means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

(15) The term "undue hardship", in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of–

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

(16) The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

38 § 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited–

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

38 § 4323. Enforcement of rights with respect to a State or private employer

(a) Action for relief.--(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person--

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(b) Jurisdiction.--(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) Venue.--(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) Remedies.--(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be covered into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) Equity powers.--The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

(f) Standing.--An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).

(g) Respondent.--In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) Fees, court costs.--(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) Inapplicability of State statute of limitations.--No State statute of limitations shall apply to any proceeding under this chapter.

(j) Definition.--In this section, the term "private employer" includes a political subdivision of a State.

Citation Search Result Rank 8 of 13 Database
S. REP. 103-158 LH
S. Rep. No. 158, 103RD Cong., 1ST Sess. 1993, 1993 WL 432576 (Leg.Hist.)

P.L. 103-353, UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1993

DATES OF CONSIDERATION AND PASSAGE

House: May 4, 1993; September 13, 1994

Senate: November 2, 1993; September 28, 1994

Cong. Record Vol. 139 (1993)

Cong. Record Vol. 140 (1994)

House Report (Veterans' Affairs Committee) No. 103-65, Apr. 28, 1993 (To accompany H.R. 995)

Senate Report (Veterans' Affairs Committee) No. 103-158, Oct. 18, 1993 (To accompany S. 843)

SENATE REPORT NO. 103-158
October 18, 1993
[To accompany S. 843]

The Committee on Veterans' Affairs, to which was referred the bill (S. 843) to amend title 38, United States Code, to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services, having considered the same, reports favorably thereon with an amendment in the nature of a committee substitute, and recommends that the bill, as amended, do pass.

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itle 38 that nothing in chapter 43 overrides any other law, or any plan, ontract, policy or practice that provides a greater benefit than chapter 43 rovides for someone serving in the uniformed services. Thus, chapter 43 is ntended to be a floor and not a ceiling on reemployment rights.

New section 4302(b) would clarify that chapter 43 preempts any State law or ny plan, contract, policy or practice that would limit chapter 43 rights or enefits or that impose any additional prerequisites on the exercise of those ights or the receipt of those benefits. The rights under chapter 43 belong to he employee and, as such, can only be waived through unambiguous and voluntary ction by the employee.

ection 4303. Definitions

New section 4303 would define, for the first time, various terms used in hapter 43.

New section 4303(1) would define "Attorney General" as the Attorney General of he United States as well as any person designated by the Attorney General to arry out a responsibility of the Attorney General under chapter 43.

New section 4303(2) would define "benefit" or "benefit of employment", or rights and benefits" as any advantage, profit, privilege, gain, status, ccount, or interest (other than wages or salary for work not performed while bsent from employment) that accrues by reason of an employment contract or an mployer practice or custom and includes by way of illustration the various ttributes of the employment relationship that might be affected by an absence rom employment.

New section 4303(3)(A) would define "employee" as any person employed by an mployer. The Committee intends the term "employee", including temporary mployees (see discussion of new section 4312), to be considered in the same xpansive manner as under the Fair Labor Standards Act, 29 U.S.C. 203(e). The ommittee intends that the term "employee" would include former employees of an mployer as the Court of Appeals for the 11th Circuit held in Bailey v. USX orp., 850 F.2d 1506, 1509 (11th Cir. 1988). The Committee expects that in ases in which the issue of whether an individual is an independent contractor r employee would be resolved in the same manner as under the Fair Labor tandards Act.

New section 4303(3)(B) would provide that with respect to employment in a oreign country, the term "employee" includes an individual who is a citizen of he United States.

New section 4303(4)(A) would define "employer" broadly as any person, nstitution, organization, or other entity that pays salary or wages for work erformed or that has control over employment opportunities, including the ederal Government, a State (which would include its political subdivisions), nd any successor to the employer's interests.

This definition also would include potential employers in cases in which there s an allegation of a failure to hire an applicant in violation of the VRR law s well as entities to which certain employment-related responsibilities have een delegated, such as pension funds. The definition is intended to apply to nsurance companies that administer employers' life, long- term disability, or ealth plans, so that such entities cannot refuse to modify their policies in

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UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

P.L. 103–353, see page 108 Stat. 3149

DATES OF CONSIDERATION AND PASSAGE

House: May 4, 1993; September 13, 1994

Senate: November 2, 1993; September 28, 1994

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Cong. Record Vol. 140 (1994)

House Report (Veterans' Affairs Committee)
No. 103–65, Apr. 28, 1993
[To accompany H.R. 995]

Senate Report (Veterans' Affairs Committee)
No. 103–158, Oct. 18, 1993
[To accompany S. 843]

The House bill was passed in lieu of the Senate bill. The House Report (this page) is set out below. An Explanatory Statement (page 2493) and a President's Signing Statement (page 2515–1) follows.

HOUSE REPORT NO. 103–65

[page 1]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 995) to amend title 38, United States Code, to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services, and for other purposes, having considered the same, reports favorably thereon with an amendment, by unanimous voice vote, and recommends that the bill as amended do pass.

. . . . .

[page 16]

. . . . .

INTRODUCTION

On February 18, 1993, the Honorable G.V. (Sonny) Montgomery, Chairman of the Subcommittee on Education, Training and Employment and of the full Committee, introduced H.R. 995, a bill to improve reemployment rights and benefits of veterans and of members of the uniformed services. Original cosponsors of the bill included Mr. Stump, Mr. Penny, Mr. Smith of New Jersey, Mr. Slattery, Mr. Clyburn, and Mr. Quinn. Other cosponsors include Ms. Waters, Ms. Brown of Florida, Mr. Everett, Mr. Hefner, Mr.

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Section 4303(13) would define "service in the uniformed services" to include all types of military training or service, including active duty, active duty for training, initial active duty for training and inactive duty training, etc. Under current law, entitlements and eligibility criteria for reemployment rights differ based upon categories of military training or duty. It is the Committee's view that those distinctions are no longer appropriate for reemployment rights purposes and only lead to confusion and anomalous results in some cases.

Section 4303(14) would define "State" to include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States, together with the agencies and political subdivisions of each.

Section 4303(15) would define "undue hardship" as an action requiring significant difficulty or expense, taking into consideration certain specified factors.

Section 4303(16) would define "uniformed services" to include all five armed services and their reserve components. In addition, the commissioned corps of the Public Health Service would be added to the categories of beneficiaries of the reemployment rights statute. This section would also give the President the authority to designate any other category of persons a "uniformed service" during time of war or national emergency.

SUBCHAPTER II—EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS

Section 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

Current law protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment, (*see Beattie* v. *The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle* v. *Burke*, 925 F.2d 497 (1st Cir. 1991)), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson* v. *Trane Co.*, 738 F.2d 770, 775 (7th Cir. 1984). The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.

If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued

before or during the employee's military service, and processing of the claim should not await completion of the service, even if for only lost wages.

Section 4311(b) would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer* v. *Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.

Section 4311(c) makes explicit that the anti-retaliation provisions contained in the reported bill apply to persons who not only file a complaint, either with his or her employer (*see Henry* v. *Anderson County, Tenn.*, 522 F. Supp. 1112, 1115 (E.D. Tenn. 1981)), or with a governmental agency, but applies as well to persons who testify in any proceeding under chapter 43, even if that person was not the subject of the proceeding, and to persons who assist or otherwise participate in an investigation under chapter 43, even if those persons were not the subject of the investigation. Accordingly, a person protected under this section need not be a member of the uniformed services.

Section 4312—Reemployment rights of persons who serve in the uniformed services

Section 4312(a) would provide an unqualified right to reemployment to persons who leave other than temporary positions to serve on any type of military duty, whether voluntary or involuntary, if the notice requirement of subsection (a)(1) is met, the cumulative length of military service found in subsection (a)(2) is not exceeded and the reporting or application requirement of subsection (e) is complied with. This section applies with equal force to employers of private employees, state and local governments and the Federal Government.

employees. The Secretary will have the additional responsibility, however, of investigating complaints filed by federal employees, including employees of the Postal Service.

Section 4322(b) provides the mechanism for filing a complaint and directs the Secretary to provide technical assistance in specified circumstances.

Section 4322(c)(1)(A) provides that where an amicable settlement cannot be reached, in the case of a private or state or local government employer, legal referral would be required to be made to the Attorney General by the Secretary upon request by the claimant.

The determination as to whether the Attorney General shall offer legal representation to a claimant under chapter 43 is to be made solely upon an assessment of the merits of the claimant's case. If the Attorney General determines that the Federal Government should provide legal representation, the Attorney General would be required to assign responsibility for providing such representation to the appropriate United States Attorney or to a Department of Justice attorney, or, as is suitable, to the Solicitor of Labor.

Under section 4322(c)(1)(B), if the Attorney General declines to provide representation, or if for any reason the claimant does not desire to be represented by Federal Government counsel, the claimant could file suit through private counsel retained at his or her own expense or pro se. This is in accordance with the practice under the existing reemployment statute.

With reference to federal employees, under section 4322(c)(2)(A), absent a settlement of a claim by the Secretary, and if the Secretary is reasonably satisfied that a violation has occurred, the claim would, upon request by the claimant, be required to be forwarded to the Office of Special Counsel (OSC) for litigation before the Merit Systems Protection Board (MSPB). The same option to proceed with private counsel before the MSPB is also available to federal employees pursuant to section 4322(c)(2)(B).

Section 4322(d) provides for the litigation of contested cases in federal district court on behalf of employees of private employers and State or local governments. Section 4322(d)(2) provides that the courts are empowered to require employers to comply with the provisions of this chapter, to compensate the employee for any loss of wages or benefits, and to award liquidated damages in the case of willful violations. A violation shall be considered to be willful if the employer or potential employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [provisions of this chapter]." *Hazen Paper Co.* v. *Biggins*, 61 U.S.L.W. 4323, 4327 (U.S. Supp. Ct., decided April 20, 1993).

Section 4322(d)(3)(A) precludes the imposition of fees or court costs for persons claiming rights or benefits under this chapter.

Section 4322(d)(3)(B) would permit a prevailing servicemember who is an employee of a private employer or state or local government, to be awarded attorney's fees and other litigation expenses if the case is pursued through private counsel.

Section 4322(d)(4) would make explicit that the federal district court may use its full equity powers, including issuance of temporary restraining orders, where appropriate.

Section 4322(d)(5) would provide that only persons claiming rights or benefits under chapter 43 may initiate an action, i.e., no declaratory judgment actions by employers, prospective employers or other entities (such as pension plans or unions) can be filed.

Section 4322(d)(6) would reaffirm present law that only the employer (or prospective employer) is a necessary party respondent in an action initiated under this chapter. *See Muir* v. *U.S. Steel Corp*, 41 F.R.D. 428 (E.D. Pa. 1967).

Section 4322(d)(7) would reaffirm the 1974 amendment to chapter 43 that no State statute of limitation shall apply to any action under this chapter. It is also intended that state statutes of limitations not be used even by analogy. *See Stevens* v. *Tennessee Valley Authority*, 712 F.2d 1047, 1056-1057 (6th Cir. 1983). Moreover, the Committee reaffirms, as was made clear in the 1974 legislative history, "that the time spent by the government agencies charged with the administration and enforcement of this Act in investigation, negotiation, and preparation for suit shall [not] be charged against the veteran in any consideration of a time-barred defense," i.e., laches. Senate Report No. 93-907, 93rd Cong., 2d Sess. at 111-112 (June 10, 1974). *See Lemmon* v. *Santa Cruz County, Cal.*, 686 F. Supp. 797, 805 (N.D. Cal. 1988). Additionally, in dealing with the prejudice element of the laches defense, it was also made clear in Senate Report No. 93-907 at 113 "that the 'bumping of employees . . . [does not] constitute prejudice to the employer . . . " To the same effect, the payment of back wages or lost benefits, by itself, does not constitute prejudice in the laches context. *See Goodman* v. *McDonnell Douglas Corp.*, 606 F.2d 800, 808 (8th Cir. 1979); *Cornetta* v. *United States*, 851 F.2d 1372, 1380-82 (Fed. Cir. 1988).

Section 4322(d)(8) would make explicit that states are subject to the same remedies as imposed on private sector employers for violations of chapter 43 in conformance with the decision in *Reopell* v. *Comm. of Mass.*, 936 F.2d 12 (1st Cir. 1991).

In terms of the monetary remedies awarded under chapter 43, the principle that lost wages or other benefits lost because of violations of chapter 43 are to be calculated on a pay period-by-pay period basis is hereby affirmed. *See Dyer* v. *Hinky Dinky, Inc.*, 710 F.2d 1348, 1351-52 (8th Cir. 1983). Also affirmed by the Committee are the decisions in *Stevens* v. *Tennessee Valley Authority*, 699 F.2d 314, 316 (6th Cir. 1983) and *Hanna* v. *American Motors Corp.*, 724 F.2d 1300, 1312-1313 (7th Cir. 1984), which hold that a veteran or reservist does not waive his or her rights under the Act by refusing an offer of reemployment which extends anything less than full statutory guarantees, including proper seniority, position, pay and lost wages and benefits.

Section 4322(e) would give to the Merit Systems Protection Board (MSPB) the jurisdiction to decide contested cases concerning Federal sector reemployment rights, including cases brought by former Federal employees and employees or former employees of non-appropriated fund instrumentalities of the United States. MSPB determinations would be reviewable by the United States Court of Appeals for the Federal Circuit in the same manner that MSPB determinations generally are reviewable.

ENFORCEMENT

State or Private Employer

Current law: Under section 4302, in the case of a private or State employer who fails or refuses to comply with the reemployment laws, (1) the district court of the United States for the district in which the employer maintains a place of business, exercises authority, or carries out its function, has the power, upon the filing of a motion, petition, or other appropriate pleading by the individual entitled to the benefits of the reemployment laws, to require the employer to comply with the reemployment law and to compensate the individual for any loss of wages or benefits suffered by reason of the employer's unlawful action; (2) the United States attorney or comparable official, if reasonably satisfied that an individual who applies for representation is entitled to the reemployment benefits, must appear and act as an attorney for the individual in the amicable adjustment of the claim or in the filing and prosecution of a complaint; (3) no fees or court costs may be taxed against an individual who applies for such benefits; (4) only the employer may be deemed a necessary party respondent; and (5) no State statute of limitations may apply to any proceedings.

House bill: Proposed new section 4322 is similar to current law except that it would provide that (1) if the Secretary of Labor, after investigation, is reasonably satisfied that a violation has occurred and efforts to obtain voluntary compliance are not successful, and if the claimant requests referral for litigation, the Secretary must refer the case to the Attorney General; (2) the Attorney General, if reasonably satisfied that the individual requesting representation is entitled to the rights or benefits sought, may appear and act as attorney for the claimant in the filing and prosecution of a complaint; (3) an individual may be represented before the District Court by a counsel of choice; (4) the court may award an individual who prevails a reasonable attorney's fee, expert witness fee, and other litigation expenses; (5) the court may use its full equity powers to vindicate rights under the Act; (6) a reemployment rights claim may only be initiated by an individual claiming such rights or benefits, not by an employer, prospective employer, or other entity with obligations under the reemployment law; (7) a State will be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer; and (8) if the District Court determines that the employer's failure to comply with the provisions of chapter 43 were willful, the court may require the State or private employer to pay, in addition to the compensation determined to be paid the person, an amount equal to that compensation as liquidated damages.

Senate amendment: Proposed new section 4322 is substantively identical to the House provision.

Compromise agreement: Section 4323 contains these provisions.

EXPLANATORY STATEMENT
P.L. 103-353

Federal Government as Employer

Current law: Section 4303(a) provides that the Director of the Office of Personnel Management is authorized and directed when the Director finds, upon appeal of the individual concerned, that any agency in the executive branch or the government of the District of Columbia has failed or refuses to comply with the provisions of the law relating to reemployment by the executive branch or the government of the District of Columbia, to issue an order requiring compliance and to compensate the individual for any loss of salary or wages suffered by reason of failure to comply, less any amounts received by the individual through other employment, unemployment compensation, or readjustment allowances.

House bill: Proposed new section 4322(e), which applies with respect to the Federal Government as employer, would provide that (1) if the Secretary, after investigation, is reasonably satisfied that a violation has occurred with respect to the Federal Government as employer and efforts to obtain voluntary compliance are not successful, and if the claimant requests that the claim be referred for litigation before the Merit Systems Protection Board (MSPB), the Secretary would be required to refer the case to the Office of the Special Counsel; (2) if the Special Counsel is reasonably satisfied that the individual requesting representation is entitled to the rights or benefits sought, the Special Counsel would be required to appear and act as an attorney for the claimant in filing and pursuing an appeal to the MSPB; (3) if the Special Counsel were to decline to represent an individual after receiving a referral from the Secretary or if an individual were to decide not to apply to the Secretary for assistance or to use the Special Counsel for representation, the individual may be represented before the MSPB by counsel of the individual's choice; (4) if the MSPB concludes that a Federal Government employer has failed or refused to comply with the reemployment laws or that the Director of OPM has not met his or her obligation under the reemployment law, it would require the employing agency or the Director to comply with the law and to compensate the individual for any loss of wages or benefits suffered by reason of the unlawful action; and (5) a claimant would be able to petition the United States Court of Appeals for the Federal Circuit to review a decision of the MSPB in which the claimant is denied the relief sought, but would not be represented by the Secretary or the Special Counsel before the Court of Appeals or the Supreme Court.

Senate bill: Proposed new section 4323 is substantively identical to the House provision but would provide that (1) the individual would be able to be represented before the MSPB by a representative of choice; (2) the MSPB would be able to award the individual reasonable attorney fees, expert witness fees, and other litigation expenses; and (3) an individual would be able to be represented by the Special Counsel in an action for a review of a decision issued by

No. _____

In the
SUPREME COURT OF THE UNITED STATES

William E. Gagnon, Jr.,

Petitioner,

v.

Sprint Corporation d/b/a Sprint, Sprint Spectrum L.P.
and Sprint Spectrum Finance Corporation d/b/a Sprint PCS,

Respondents.

On Petition for Writ of Certioriari
To The United States Court of Appeals
For the Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME II

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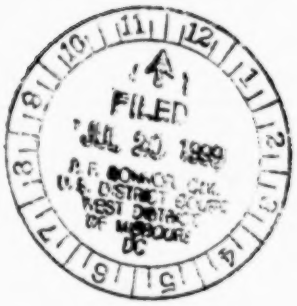
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI



WILLIAM E. GAGNON, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No.** 99-0683-CV-W-5
	)	
SPRINT CORPORATION d/b/a SPRINT, SPRINT SPECTRUM L.P. and SPRINT SPECTRUM FINANCE CORPORATION d/b/a SPRINT PCS,	)	ECF
	)	
Defendants.	)	
	)	

COMPLAINT

Plaintiff, William E. Gagnon, Jr., by and through his attorneys of record, brings this cause of action against defendants for appropriate legal and equitable relief pursuant to the Veterans' Employment and Reemployment Rights Act of 1994, as amended, 38 U.S.C. Sec. 4301 *et seq.*, and specifically 38 U.S.C. Sec. 4311, Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited, ("Veterans' Rights Act"); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et seq.*, ("Title VII"); and the Missouri Human Rights Act, Mo. Ann. Stat. Sec. 213.010 *et seq.*, as amended, ("MHRA").

JURISDICTION AND VENUE

1. Plaintiff, Mr. Gagnon, is a citizen and resident of the State of Kansas currently residing at 14815 W. 93rd Terrace, Lenexa, Kansas.

2. Defendant, Sprint Corporation d/b/a Sprint, is a registered Kansas corporation with its principal place of business at 2330 Shawnee Mission Parkway, Westwood, Kansas, its Missouri place of business at 8140 Ward Parkway, Kansas City, Missouri, and its Registered Agent in Missouri as CT Corporation System, 120 South Central Avenue, Clayton, Missouri 63105, and is the parent corporation of Sprint Spectrum L.P. and Sprint Spectrum Finance Corporation d/b/a Sprint PCS.

3. Defendant, Sprint Spectrum L.P., is a registered Delaware limited partnership d/b/a as Sprint PCS with its principal place of business at 4900 Main, Kansas City, Missouri and its Registered Agent in Missouri as CSC-Lawyers Inc. Service Co., 222 East Dunklin Street, Jefferson City, Missouri 65101.

4. Defendant, Sprint Spectrum Finance Corporation, is a Delaware corporation dually filed with Sprint Spectrum L.P. d/b/a Sprint PCS with its principal place of business at 4900 Main, Kansas City, Missouri and its Registered Agent in Missouri as CSC-Lawyers Inc. Service Co., 222 East Dunklin Street, Jefferson City, Missouri 65101.

5. This cause of action is for legal and equitable relief.

6. Defendants, jointly and separately, are each an "employer" within the meaning of the Veterans' Rights Act, Title VII and the MHRA.

7. This Court has jurisdiction of this cause of action pursuant to the provisions of 38 U.S.C. Sec. 4323, 42 U.S.C. Sec. 2000e-5 and 28 U.S.C. Sections 1331 and 1367. Venue is proper in this Court pursuant to the provisions of 28 U.S.C. Section 1391.

8. The unlawful employment practices alleged in this Complaint arose out of actions committed by defendants within this jurisdictional district.

9. A Charge of Discrimination was filed, pursuant to Title VII and the Missouri Human Rights Act, with the Equal Employment Opportunity Commission ("EEOC") and the Missouri Commission on Human Rights ("MCHR") on April 21, 1998. *(Exhibit A, attached)*. A second Charge of Discrimination was filed with the EEOC and the MCHR, asserting a claim of retaliation, on November 4, 1998. *(Exhibit B, attached)*. The Charge of Discrimination was commenced simultaneously with the EEOC and the MCHR, inasmuch as the State of Missouri has a working agreement with the EEOC.

10. The Charge of Discrimination was filed with the EEOC and the MCHR within 180 days of the most recent unlawful employment practices alleged.

11. More than 180 days have elapsed since Plaintiff filed his Charges of discrimination and, accordingly, plaintiff requested and received his Notice of Right to Sue from the EEOC dated June 10, 1999 and June 14, 1999, *(Exhibits C, attached)*, and from the MCHR, dated May 11, 1999, *(Exhibits D, attached)*. Plaintiff has reasonably exhausted all administrative remedies prior to the commencement of this legal action.

12. Plaintiff has attempted to resolve his cause of action against defendants, but defendants have rejected all reasonable attempts by Plaintiff for resolution prior to filing of this lawsuit.

GENERAL FACTS

13. Plaintiff was in continuous, active military service with the United States Army for twenty-one years and five days and attained the rank of Lieutenant Colonel.

14. As an Officer in the United States Army, Plaintiff received numerous decorations of honor, served in three overseas military conflicts, including one overseas military campaign and engaged in continued service both in the United States and overseas throughout his military career. Plaintiff served in numerous positions and commands with the U.S. Army including, in part, as an Aviator, Flight Commander, Operations Officer and Chief of training and development, operations and plans, strategic planning and information systems management. In Plaintiff's various posts and commands, he served for over thirteen years in administering and developing training management with a training specialty within the Armed Forces. Such training skills involved the ability to provide training programs for groups ranging from several thousand specialists (such as pilots) to over 50,000 persons in various operations and included skills in logistics, planning, computer based training, training support, training standards, budget, security, network data communications, and development of training programs. Plaintiff has a Bachelors of Science degree in Marketing from East Tennessee State University, a Masters of Science degree in Adult, Occupational and Continuing Education from Kansas State University, and has completed numerous non-degreed training courses in leadership, management, training development, organization and systems analysis, budgeting, and strategic planning.

15. Plaintiff's last station of assignment with U.S. Army was Fort Leavenworth, Kansas, where he received an Honorable Discharge from Active Duty, effective January 31, 1997.

16. Plaintiff's gender is male and his race, for purposes of Title VII, is white.

17. Plaintiff was hired by defendants in March 1997. In October 1997, Plaintiff was promoted to the position of Manager, Multimedia/Computer Based Training in the Training and Performance Support Department. Plaintiff remains in this Manager's position, to date. At all times, relevant to the facts of this Complaint, Plaintiff was employed by and worked for defendants in the State of Missouri at 4717 Grand and 4800 Main Street, Kansas City.

18. Plaintiff's immediate supervisor was, and continues to be, Kathleen Wilder, Director. Lynn Meredith-Ball was Manager, Operations and Production, where her immediate supervisor was also Ms. Wilder. In 1997, Ms. Wilder reported to James Mendenhall, Vice President.

19. Near the time of Plaintiff's promotion, Ms. Wilder was on maternity leave. During this leave, Ms. Meredith-Ball was given certain assignments of Ms. Wilder. One such assignment was the processing of Plaintiff's revised salary schedule. Defendants use a compensation system called Market Reference Point ("MRP") to determine compensation for employees.

20. Plaintiff was earning an annual salary of $45,083.43 prior to the promotion. The Management recommendation was for about a 33% salary adjustment plus additional compensation through a system called, Short Term Incentive, ("STI"). Defendants' Human Resources office recommended a 25% increase which would provide an MRP of 85%.

21. Ms. Meredith-Ball approached Mr. Mendenhall to have the paperwork signed and approved for the promotion and the salary adjustment of Plaintiff. Mr. Mendenhall asked if the Plaintiff was, "a white guy". Ms. Meredith-Ball responded affirmatively and Mr. Mendenhall stated, "Then I don't need to pay him the MRP – if he were a woman or a minority I would have to pay him, but I don't because he's just a white guy."

22. Mr. Mendenhall authorized only a 10% salary adjustment stating the reasons for the lower amount as Plaintiff's gender and race as a white male. Plaintiff thus received a salary of $50,100 with an STI target of $9,500. This equated to approximately 70-75% of Plaintiff's MRP and was lower than his comparable co-workers.

23. This matter involving gender and race discrimination was reported to defendants and to Ms. Wilder. No investigation or corrective action was reported to Plaintiff, and none is known to exist.

24. Ms. Wilder over the next several months made continued indications to Plaintiff that his compensation would be increased. However, there was no increase at the levels promised.

25. In more than one conversation, between November 1997 through January 1998, Ms. Wilder complained to Ms. Meredith-Ball that Plaintiff should not be concerned about more compensation, because he was already receiving military retirement. Ms. Wilder also indicated that the "white guy" comment was funny and Plaintiff should not be concerned about it.

26. Beginning in 1998, Ms. Wilder became openly hostile about Plaintiff's continued inquiries about the pay adjustment, despite the fact that Ms. Wilder continued to indicate that she was working on trying to get him the adjustment. She discussed this personnel matter in a non-confidential manner both with persons inside and outside defendants' workplace. At one point, she made another derogatory comment about Plaintiff's veteran status remarking that her husband said, "Bill [plaintiff] ought to know not to piss on the old man's shoes – [he] said you would know what that means."

27. Ms. Wilder stated she could get pay raises for females and minorities, but not for Plaintiff. Ms. Wilder also began to complain about Plaintiff to other staff members.

28. Defendants' management began to make derogatory comments about too many former military persons being hired in the training department, despite the limited hiring pool of qualified job candidates and despite the resource of the Fort Leavenworth military base where there were a number of training specialists leaving the Armed Forces. Members of management referred to the military as lacking "diversity" and equating former members of the Armed Forces as only being white, males.

29. Also, during this time period, other former military persons were interviewed and found to be highly qualified for the positions, yet they were given specific, discriminatory, negative references, because they were "career military" and presumed not to fit the "diversity" goals of the department. These candidates also received negative reference by specific reference to Plaintiff as being a career military officer and a white, male.

30. Plaintiff and Ms. Meredith-Ball reported, to management, that the negative references based upon protected class status under the employment laws were discriminatory. These reports were ignored in regard to an investigation and any remedial relief.

31. In April 1998, Plaintiff filed a Charge of Discrimination with the EEOC and the MCHR for gender and race discrimination. He also asserted additional complaints, internally, about the veterans' status discrimination. Shortly, thereafter, management became hostile toward both Plaintiff and Ms. Meredith-Ball which created a negative impact on Plaintiff's employment.

32. Later on in 1998, management openly discussed a desire to not hire former career military personnel. This open attitude resulted in interviewees being directly challenged and critiqued due to their military background, differently than other candidates. It also created a negative impact on the workplace for those veterans employed, including Plaintiff, and impacted their employment.

33. In July 1998, Ms. Wilder stated she was not going to let Plaintiff seek a promotion to another department.

34. By August 1998, the complaints of discrimination and retaliation to management had still not been investigated by defendants. Members of management told Plaintiff that he had created a problem for defendants by complaining about discrimination. This led to an investigation by defendants directly against Plaintiff and Ms. Meredith-Ball.

35. The "investigation" resulted in tactics to attempt to force co-workers to make false statements or misleading comments. Further, neither Plaintiff nor Ms. Meredith-Ball were significantly involved in the investigative process. The investigation was not complete, ignored relevant facts and resulted in false conclusions.

36. As a result of this "investigation", on August 27, 1998, Plaintiff and Ms. Meredith-Ball were issued formal, written reprimands for creating, "...a false perception that discrimination is occurring in the workplace." Plaintiff was warned not to retaliate against others as a result of the action being taken against him, even though defendants were retaliating against Plaintiff, because he complained about discrimination. Further, as a result of the "Written Reminder", Plaintiff was prohibited from seeking any transfers or promotions for a six month period of time without the approval of the Vice President.

37. Plaintiff made a written request to defendants seeking permission to apply for a transfer position. This request was denied.

38. The disciplinary action against Plaintiff had a direct and indirect impact upon his ability to receive any other position after the six-month disciplinary period and tainted others from being willing to employee him.

39. After this disciplinary action was taken against Plaintiff, Ms. Wilder continued to make specific inquiries of staff members with military backgrounds in an attempt to obtain negative comments about Plaintiff and to pressure those with a military background. This type of conduct caused other members of management to continue to treat Plaintiff and others with a military background differently and in a discriminatory and hostile manner.

40. In late 1998, Plaintiff was informed by defendants that another investigation into his conduct was being conducted. However, it was never indicated to Plaintiff that any investigation of the discrimination complaints was being followed-up on.

41. By year end, 1998, the appropriate compensation adjustments had still not been made to Plaintiff's compensation.

42. Defendants' management continued, even to date, with actions and demeanor discriminating against Plaintiff and others with a military background and with the perception of intending to treat Plaintiff differently because of his gender and race. Management, for example, has specifically indicated that those with a military background are too rigid and inflexible to hold higher management positions.

43. Defendants in-house legal department was directly involved with the discriminatory conduct against Plaintiff in carrying out a management function on behalf of defendants.

44. In late 1998, the defendants' legal department informed Plaintiff that it had opened an investigation into Plaintiff's complaints of retaliation. The legal department directed this investigation through the Corporate Security Department. The investigation did not follow-up on statements from people Plaintiff had identified as witnesses; created attempts to coax misleading statements from staff members; and, the investigators attempted to force Plaintiff to sign

misleading and incomplete statements drafted by the investigators and being held out as Plaintiff's statement. Plaintiff was subsequently informed by the legal department that it concluded no retaliation had occurred. However, there remained no indication that an investigation into the charges of discrimination on gender, race or veteran's status was conducted.

45. On November 4, 1998, Plaintiff filed a Charge of Discrimination with the EEOC and the MCHR for retaliation.

46. By at least the first part of 1999, defendants, including management, openly held out to others that Plaintiff was a "troublemaker" based upon his complaints of discrimination. Again, nothing was done to stop this discrimination and retaliation and Plaintiff's ability to manage his department was significantly hindered along with his ability to obtain a comparable transfer or promotion.

47. Plaintiff continues to be discriminated against by defendants on the basis of his veterans' status, his gender and his race.

48. As a result of this discrimination, Plaintiff has sustained damage to his reputation and has been subject to intimidation and threat to his employment and future career opportunities.

COUNT I

(Veterans' Rights Act Discrimination)

Plaintiff adopts and incorporates by reference, as though fully set forth herein, paragraphs 1 through 48 of this Complaint.

49. Plaintiff is a protected person under the Veterans' Rights Act.

50. Defendants denied plaintiff reasonable promotion opportunities, benefits of employment and threatened his employment retention based upon his protected status and took discriminatory action against plaintiff, including but not limited to, adverse employment action based upon his protected status where such discriminatory treatment and adverse employment action would not have been taken but for his protected status as a military veteran.

51. Defendants subjected Plaintiff to an offensive and intimidating work environment which was harassing and was motivated by Plaintiff's protected status as a military veteran.

WHEREFORE, Plaintiff prays that the Court:

(a) Adjudge and decree that defendants have discriminated against Plaintiff on the basis of his protected status as a military veteran in violation of the Veterans' Employment and Reemployment Rights Act, 38 U.S.C. Sec. 4301 *et seq.*, as amended, and that such discrimination was a willful failure to comply with the provisions of the Veterans' Rights Act;

(b) Order defendants to make Plaintiff whole for the loss of income and benefits he has suffered as a result of defendants' unlawful employment practices, including back pay, front pay and loss of compensation due to discrimination in failure to promote or involving transfer opportunities; reimbursement of any lost fringe benefits; retirement plan benefits; pension benefits; 401k plan benefits; social security contributions; and any and all other contributions or benefits; and including prejudgment interest, for the damages suffered by Plaintiff;

(c) Order defendants to pay liquidated damages in compliance with the Veterans' Rights Act, 38 U.S.C. Sec. 4323(c)(1)(A)(iii).

(d) Order defendants to comply with the Veterans' Rights Act as to Plaintiff and other employees and prospective employees; develop a written compliance program subject

to Court approval which includes, but is not limited to, policy revisions, training programs, affirmative action and recruiting, a retraining program for veterans to gain specific telecommunications workplace skills consistent with the veteran's skills and background, public postings in the workplace of non-compliance violations and strategies to provide compliance, provide for a veterans' liaison who shall report to the Court, provide policies and action to appropriately deal with employees and representatives of defendants who engage or have engaged in discriminatory conduct, and to provide notice to the United States Government and each office of the United States Armed Forces notifying them of the non-compliance and advising of the strategies to provide compliance.

(e) Order defendants to pay all costs and expenses of litigation, including reasonable attorneys' fees; and

(f) Grant such additional affirmative or equitable relief as the Court may deem just and proper.

COUNT II

(Veterans' Rights Act - Retaliation)

Plaintiff adopts and incorporates by reference, as though fully set forth herein, paragraphs 1 through 51 of this Complaint.

52. Plaintiff was subject to retaliation for exercising his rights pursuant to the Veterans' Rights Act, which affected the terms, conditions, benefits, wages and privileges of his employment. Further, such action was willful under the laws protecting military veterans.

WHEREFORE, Plaintiff prays that the Court:

(a) Adjudge and decree that defendants have retaliated against Plaintiff on the

basis of his protected status as a military veteran in violation of the Veterans' Employment and Reemployment Rights Act, 38 U.S.C. Sec. 4301 *et seq.*, as amended, and that such discrimination was a willful failure to comply with the provisions of the Veterans' Rights Act;

(b) Order defendants to make Plaintiff whole for the loss of income and benefits he has suffered as a result of defendants' unlawful employment practices, including back pay, front pay and loss of compensation due to discrimination in failure to promote or involving transfer opportunities; reimbursement of any lost fringe benefits; retirement plan benefits; pension benefits; 401k plan benefits; social security contributions; and any and all other contributions or benefits; and including prejudgment interest, for the damages suffered by Plaintiff;

(c) Order defendants to pay liquidated damages in compliance with the Veterans' Rights Act, 38 U.S.C. Sec. 4323(c)(1)(A)(iii).

(d) Order defendants to comply with the Veterans' Rights Act as to Plaintiff and other employees and prospective employees; develop a written compliance program subject to Court approval which includes, but is not limited to, policy revisions, training programs, affirmative action and recruiting, a retraining program for veterans to gain specific telecommunications workplace skills consistent with the veteran's skills and background, public postings in the workplace of non-compliance violations and strategies to provide compliance, provide for a veterans' liaison who shall report to the Court, provide policies and action to appropriately deal with employees and representatives of defendants who engage or have engaged in discriminatory conduct, and to provide notice to the United States Government and each office of the United States Armed Forces notifying them of the non-compliance and advising of the strategies to provide compliance.

(e) Order defendants to pay all costs and expenses of litigation, including reasonable attorneys' fees; and

(f) Grant such additional affirmative or equitable relief as the Court may deem just and proper.

COUNT III

(Title VII and MHRA - Discrimination Based on Gender)

Plaintiff adopts and incorporates by reference, as though fully set forth herein, paragraphs 1 through 52 of this Complaint.

53. Plaintiff was subject to discriminatory treatment by the defendants based upon Plaintiff's gender, male, which affected the terms, conditions, benefits, wages and privileges of Plaintiff's employment and which was in reckless indifference to his rights under Title VII and the MHRA and was wanton and willful.

WHEREFORE, Plaintiff prays that the Court:

(a) Adjudge and decree that defendants have discriminated against Plaintiff on the basis of his gender and race in violation of Title VII, 42 U.S.C. Sec. 2000e *et seq.*, as amended, and the MHRA, Mo.Ann.Stat. Sec. 2132.010 *et seq.*, and that such discrimination was in reckless indifference of Plaintiff's rights and was wanton and willful;

(b) Order defendants to make Plaintiff whole for the loss of income and benefits he has suffered as a result of defendants' unlawful employment practices, including back pay, front pay and lost bonuses from the time of the unlawful discrimination; reimbursement of any lost fringe benefits; retirement plan benefits; pension benefits; 401(k) plan benefits; social security contributions; and any and all other contributions or benefits; and including pre-

judgment interest, for the injury and damage suffered by Plaintiff;

(c) Order defendants to pay punitive and compensatory damages in the amount of $300,000 as such amount is the statutory cap for violations of Title VII, subject to any amendment, separate from other damages under Title VII or other punitive or compensatory damages for other causes of action and punitive and compensatory damages of Five Million Dollars pursuant to the remedies allowed under the MHRA

(d) Allow Plaintiff his costs herein, including reasonable attorneys' fees; and

(e) Grant such additional affirmative and equitable relief as the Court may deem just and proper.

COUNT IV

(Title VII and MHRA - Discrimination Based on Race)

Plaintiff adopts and incorporates by reference, as though fully set forth herein, paragraphs 1 through 53 of this Complaint.

54. Plaintiff was subject to discriminatory treatment by the defendants based upon Plaintiff's race, white, which affected the terms, conditions, benefits, wages and privileges of Plaintiff's employment and which was in reckless indifference to his rights under Title VII and the MHRA and was wanton and willful.

WHEREFORE, Plaintiff prays that the Court:

(a) Adjudge and decree that defendants have discriminated against Plaintiff on the basis of his gender and race in violation of Title VII, 42 U.S.C. Sec. 2000e *et seq.*, as amended, and the MHRA, Mo.Ann.Stat. Sec. 213.010 *et seq.*, and that such discrimination was in reckless indifference of Plaintiff's rights and was wanton and willful;

(b) Order defendants to make Plaintiff whole for the loss of income and benefits he has suffered as a result of defendants' unlawful employment practices, including back pay, front pay and lost bonuses from the time of the unlawful discrimination; reimbursement of any lost fringe benefits; retirement plan benefits; pension benefits; 401(k) plan benefits; social security contributions; and any and all other contributions or benefits; and including pre-judgment interest, for the injury and damage suffered by plaintiff;

(c) Order defendants to pay punitive and compensatory damages in the amount of $300,000 as such amount is the statutory cap for violations of Title VII, subject to any amendment, separate from other damages under Title VII or other punitive or compensatory damages for other causes of action and punitive and compensatory damages of Five Million Dollars pursuant to the remedies allowed under the MHRA;

(d) Allow Plaintiff his costs herein, including reasonable attorneys' fees; and

(e) Grant such additional affirmative and equitable relief as the Court may deem just and proper.

COUNT V

(Title VII and MHRA - Retaliation)

Plaintiff adopts and incorporates by reference, as though fully set forth herein, paragraphs 1 through 54 of this Complaint.

55. Plaintiff was subject to retaliation for exercising his rights pursuant to Title VII and the MHRA, which affected the terms, conditions, benefits, wages and privileges of his employment. Further, such action was in reckless indifference of his rights under the anti-discrimination laws and was wanton and willful.

WHEREFORE, Plaintiff prays that the Court:

(a) Adjudge and decree that defendants have retaliated against Plaintiff on the basis of his gender and race in violation of Title VII, 42 U.S.C. Sec. 2000e *et seq.*, as amended, and the MHRA, Mo.Ann.Stat. Sec. 213.010 *et seq.*, and that such discrimination was in reckless indifference of Plaintiff's rights and was wanton and willful;

(b) Order defendants to make Plaintiff whole for the loss of income and benefits he has suffered as a result of defendants' unlawful employment practices, including back pay, front pay and lost bonuses from the time of the unlawful retaliation; reimbursement of any lost fringe benefits; retirement plan benefits; pension benefits; 401(k) plan benefits; social security contributions; and any and all other contributions or benefits; and including pre-judgment interest, for the injury and damage suffered by plaintiff;

(c) Order defendants to pay punitive and compensatory damages in the amount of $300,000 as such amount is the statutory cap for violations of Title VII, subject to any amendment, separate from other damages under Title VII or other punitive or compensatory damages for other causes of action and punitive and compensatory damages of Five Million Dollars pursuant to the remedies allowed under the MHRA

(d) Allow Plaintiff his costs herein, including reasonable attorneys' fees; and

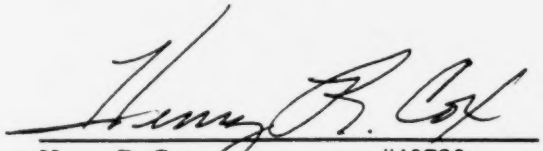
(e) Grant such additional affirmative and equitable relief as the Court may deem just and proper.

REQUEST FOR TRIAL BY JURY

The Plaintiff, William E. Gagnon, Jr., hereby requests that all issues of fact in this action be tried by a jury.

DESIGNATION OF PLACE OF TRIAL

The Plaintiff hereby designates Kansas City, Missouri, as the place of trial of this matter.



Henry R. Cox #40780
SWANSON, MIDGLEY, GANGWERE, KITCHIN & McLARNEY, LLC
922 Walnut Street, Suite 1500
Kansas City, MO 64106-1848
Telephone: (816) 842-6100
Facsimile: (816) 842-0013

ATTORNEYS FOR PLAINTIFF

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY	CHARGE NUMBER
☐ FEPA ☒ EEOC	281980705

Missouri Commission on Human Rights and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)	HOME TELEPHONE (Include Area Code)
Mr. William E. Gagnon	(913) 226-0220

STREET ADDRESS	CITY, STATE AND ZIP CODE	DATE OF BIRTH
14815 W. 93rd Terrace, Lenexa, KS 66215		08/27/53

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include Area Code)
Sprint P C S	Cat D (501 +)	(816) 559-1000

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
4900 Main Street, Kansas City, MO 64112		095

NAME	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

☒ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST — LATEST
04/21/98
☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I have been an employee of this organization since March 1997. My current position is Manager, Multimedia/Computer Based Training. I was promoted into this position in October 1997. While I was given a raise, it was only to 75% of the Market Reference Point (MRP). I am unaware of any other manager in my department receiving less than 100% of the MRP.

I am aware that the individual who made the decision on my salary commented that if I were a minority or a woman he would have to pay me, but because I am a "White guy" he did not have to. He did not approve several recommendations that would have provided me a higher salary.

In January 1998 the MRP for my position was increased to $68,000. Around the same time my salary was increased to just under 85% of that MRP.

I believe I have not been given the MRP for my position due to my race (White) and my gender (male) in violation of Title VII of the Civil Rights Act of 1964, as amended.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

4/21/98 — William E. Gagnon
Date — Charging Party (Signature)

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)

EXHIBIT A

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC

CHARGE NUMBER: 281 99 0141

Missouri Commission on Human Rights and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)	HOME TELEPHONE (Include Area Code)
Mr. William E. Gagnon	(913) 226-0220

STREET ADDRESS CITY, STATE AND ZIP CODE	DATE OF BIRTH
14815 W. 93rd Terr., Lenexa, KS 66215	09/27/1953

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include Area Code)
Sprint P C S	Cat D (501 +)	(816) 559-7517

STREET ADDRESS CITY, STATE AND ZIP CODE	COUNTY
4900 Main Street, Kansas City, MO 64112	095

NAME	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS CITY, STATE AND ZIP CODE	COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))

☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE
EARLIEST: 05/01/98 LATEST: 10/29/98
☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional space is needed, attach extra sheet(s)):

I have been employed with the above named employer since March 1997. My position is that of Manager, CBT. The company employs more than 500 persons.

On or about April 21, 1998 I filed EEOC Charge 281 98 0705 alleging discriminatory treatment because of my gender, male and race White. SInce the filing of my Charge I have been subjected to different terms, conditions and privileges of employment including but not limited to: being referred to by my supervisor as "A White Guy"; denied a wage increase that had previously had been approved; denied a request for release from my supervisor, that is required to be considered for positions in other departments; issued a displinary warning for alleged conduct infractions; lack of action on the part of management with regard to my complaints of co-worker hostility and retaliation.

I believe I have been subjected to different terms, conditions and privileges of employment in retaliation for having filed a previous Charge of Employment Discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date 11/4/98 Charging Party (Signature)

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)

EXHIBIT B

EEOC FORM 5 (Rev. 05/92)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on request)

To:	From:
Mr. William E. Gagnon 14815 W. 93rd Terrace Lenexa, KS 66215 ☐ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*	Equal Employment Opportunity Commission Kansas City Area Office 400 State Avenue - Room 905 Kansas City, KS 66101

Charge Number	EEOC Representative	Telephone Number
281 98 0705	Rita D. Scott	913-551-5845

(See the additional information attached to this form)

TO THE PERSON AGGRIEVED: This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

☒ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be be unable to complete its process within 180 days from the filing of the charge.

☒ With the issuance of this NOTICE OF RIGHT TO SUE, the Commission is terminating its process with respect to this this charge.

☐ It has been determined that the Commission will continue to investigate your charge.

☐ **ADEA:** While Title VII and the ADA require EEOC to issue this notice of right to sue before you can bring a lawsuit, lawsuit you may sue under the Age Discrimination in Employment Act (ADEA) any time 60 days after your charge

☐ **Because EEOC is closing your case,** your lawsuit under the ADEA must be brought within 90 days of your receipt of this notice. Otherwise, your right to sue is lost.

☐ **EEOC is continuing its investigation.** You will be notified when we have completed action and, if appropriate, our notice will include notice of right to sue under the ADEA.

☐ **EPA:** While Title VII and the ADA require EEOC to issue this Notice of Right to Sue before you can bring a lawsuit, lawsuit you already have the right to sue under the Equal Pay Act (EPA) (You are not required to complain to any enforcement agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years for willful violations) of the alleged EPA underpayment.

I certify that this notice was mailed on the date set out below.

6/10/99
(Date Mailed)

On Behalf of the Commission

Rita D. Scott, for
George Dixon, Area Director

Enclosures

Information Sheet
Copy of Charge

cc: Respondents

EXHIBIT C
1 of 2 Pages

EEOC Form 161-B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on request)

To:	From:
Mr. William E. Gagnon 14815 W. 93rd Terrace Lenexa, KS 66215 ☐ *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a))*	Equal Employment Opportunity Commission Kansas City Area Office 400 State Avenue - Room 905 Kansas City, KS 66101

Charge Number	EEOC Representative	Telephone Number
281 99 0141	Rita D. Scott	913-551-5845

(See the additional information attached to this form)

TO THE PERSON AGGRIEVED: This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

- [x] More than 180 days have expired since the filing of this charge.
- [ ] Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be be unable to complete its process within 180 days from the filing of the charge.
- [x] With the issuance of this NOTICE OF RIGHT TO SUE, the Commission is terminating its process with respect to this this charge.
- [ ] It has been determined that the Commission will continue to investigate your charge.
- [ ] **ADEA:** While Title VII and the ADA require EEOC to issue this notice of right to sue before you can bring a lawsuit, lawsuit you may sue under the Age Discrimination in Employment Act (ADEA) any time 60 days after your charge
  - [ ] **Because EEOC is closing your case,** your lawsuit under the ADEA must be brought within 90 days of your receipt of this notice. Otherwise, your right to sue is lost.
  - [ ] **EEOC is continuing its investigation.** You will be notified when we have completed action and, if appropriate, our notice will include notice of right to sue under the ADEA.
- [ ] **EPA:** While Title VII and the ADA require EEOC to issue this Notice of Right to Sue before you can bring a lawsuit, lawsuit you already have the right to sue under the Equal Pay Act (EPA) (You are not required to complain to any enforcement agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years for willful violations) of the alleged EPA underpayment.

I certify that this notice was mailed on the date set out below.

6/14/99
(Date Mailed)

On Behalf of the Commission

Rita D. Scott, for
George Dixon, Area Director

Enclosures

Information Sheet
Copy of Charge

cc: Respondents

EXHIBIT C
2 of 2 Pages

EEOC Form 161-B

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

MISSOURI COMMISSION ON HUMAN RIGHTS

Mel Carnahan, Governor | Karla McLaren, Department Director | Gerald Grobman, Commission Chair | Donna Carlito, Commission Executive Director

Mr. William E. Gagnon
14815 W. 93rd Terrace
Lenexa KS 66215

NOTICE OF RIGHT TO SUE

RE: Gagnon v. Sprint P C S
FE-04/98-30784; 281980705

Dear Mr. Gagnon:

This is your NOTICE OF RIGHT TO SUE pursuant to Section 213.111 RSMo.

If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice, the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating their **right to bring a civil action within 90 days of such notice** against the respondent named in the complaint. Such an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred, either before a circuit or associate circuit judge. Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section relating to the same practice or act. Any action brought in court under this section shall be filed within ninety days from the date of the commission's notification letter to the individual but **no later than two years after the alleged cause occurred** or its reasonable discovery by the alleged injured party (emphasis added).

The above-referenced complaint was filed on April 21, 1998; thus more than 180 days have elapsed since the filing and the Missouri Commission on Human Rights has not completed its administrative processing. Further, as you have duly requested in writing, you are hereby notified of your right to sue the Respondent(s) named in your complaint in state circuit court. **THIS MUST BE DONE WITHIN 90 DAYS OF THE DATE OF THIS NOTICE OR YOUR RIGHT TO SUE IS LOST.**

You are also notified that the Executive Director is hereby administratively closing this case and terminating all MCHR proceedings relating to it. No person may file or reinstate a complaint after the issuance of notice of right to sue.

On behalf of the Commission:

Shannon Thompson

Shannon Thompson
Investigations Section

May 11, 1999
Date

CERTIFIED MAIL

c: Chief Executive Officer
Sprint P C S
4900 Main Street
Kansas City MO 64112

Mr. Henry R. Cox
Swanson, Midgley, Gangwere, Kitchin, & McLarney
Commerce Trust Bldg. 922 Walnut Suite 1500
Kansas City MO 64106-1848

☑ 3315 W. Truman Blvd. P.O. Box 1129 Jefferson City, MO 65102-1129 Phone: 573/751-3325 FAX: 573/751-2905

☐ 906 Olive Suite 320 St. Louis, MO 63101 Phone: 314/340-7590 FAX: 314/340-7238

☐ 4049 Pennsylvania Ave. Suite 150 Kansas City, MO 64111 Phone: 816/889-5100 FAX: 816/889-5107 TDD: 314/340-7590 Relay - VOICE 800/735-2466 Relay - TDD 800/735-2966

☐ 108 West Center Sikeston, MO 63801-4110 Phone: 573/472-5320 FAX: 573/472-5321

EXHIBIT D
1 of 2 Pages

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

MISSOURI COMMISSION ON HUMAN RIGHTS

Mel Carnahan
Governor

Karla McLaren
Department Director

Gerald Grohman
Commission Chair

Donna Cavitt
Commission Executive Director

Mr. William E. Gagnon
14815 W. 93rd Terrace
Lenexa KS 66215

NOTICE OF RIGHT TO SUE

RE: Gagnon v. Sprint P C S
FE-11/98-31655; 281990141

Dear Mr. Gagnon:

This is your NOTICE OF RIGHT TO SUE pursuant to Section 213.111 RSMo.

If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice, the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating their **right to bring a civil action within 90 days of such notice** against the respondent named in the complaint. Such an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred, either before a circuit or associate circuit judge. Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section relating to the same practice or act. Any action brought in court under this section shall be filed within ninety days from the date of the commission's notification letter to the individual but **no later than two years after the alleged cause occurred** or its reasonable discovery by the alleged injured party (emphasis added).

The above-referenced complaint was filed on November 10, 1998; thus more than 180 days have elapsed since the filing and the Missouri Commission on Human Rights has not completed its administrative processing. Further, as you have duly requested in writing, you are hereby notified of your right to sue the Respondent(s) named in your complaint in state circuit court. **THIS MUST BE DONE WITHIN 90 DAYS OF THE DATE OF THIS NOTICE OR YOUR RIGHT TO SUE IS LOST.**

You are also notified that the Executive Director is hereby administratively closing this case and terminating all MCHR proceedings relating to it. No person may file or reinstate a complaint after the issuance of notice of right to sue.

On behalf of the Commission:

Shannon Thompson

Shannon Thompson
Investigations Section

May 11, 1999
Date

CERTIFIED MAIL

c: Chief Executive Officer
Sprint P C S
4900 Main Street
Kansas City MO 64112

Mr. Henry R. Cox
Swanson, Midgley, Gangwere, Kitchin, & McLarney
Commerce Trust Bldg. 922 Walnut Suite 1500
Kansas City MO 64106-1848

☑ 3315 W. Truman Blvd.
P.O. Box 1129
Jefferson City, MO 65102-1129
Phone: 573/751-3325
FAX: 573/751-2905

☐ 906 Olive
Suite 320
St. Louis, MO 63101
Phone: 314/340-7590
FAX: 314/340-7238

☐ 4049 Pennsylvania Ave.
Suite 150
Kansas City, MO 64111
Phone: 816/889-5100
FAX: 816/889-5107
TDD: 314/340-7590
Relay - VOICE 800/735-2466
Relay - TDD 800/735-2966

☐ 108 West Cessar
Sikeston, MO 63801-4110
Phone: 573/472-5320
FAX: 573/472-5321

EXHIBIT D
2 of 2 Pages

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WILLIAM E. GAGNON, JR., Plaintiff,
vs. No. 99-0683-CV-W-1
SPRINT CORPORATION, et al., Defendant.
Monday, January 22, 2001, Kansas City, Missouri

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE,
and a jury

VOLUME I

APPEARANCES:

FOR THE PLAINTIFF:
Mr. Henry R. Cox
Mr. Don R. Lolli
Swanson Midgley, LLC.
Crown Center
2420 Pershing Road, Ste. 400
Kansas City, Missouri 64108

FOR THE DEFENDANTS:
Mr. John J. Yates
Mr. Joseph H. Knittig
Husch & Eppenberger LLC.
1700 One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105

COURT REPORTER:
Cynthia M. Johnson, RMR
U.S. Court Reporter
400 East 9th Street, Room 8552
Kansas City, Missouri 64106
(816)512-5657

Proceedings reported by computer stenography; transcript produced by computer.

the corporate records. It was given to the client that addresses this issue and explains. We also have a witness that is still with Sprint, yet moved, I think to Nevada now, and we're going to be reading her deposition. She's holding out that she was the person making a decision about the retaliation. And we believe we should have full latitude to show that the reason given for the disciplinary memo which we claim is retaliation, was a false reason. That's part of something we're allowed to prove. And that has to do with what she said in her deposition and the sequence of events following the retaliation, then complaining about it, and then a further decision being made that there was no retaliation. That is the totality of the circumstances. Keeping that out prohibits us from legitimately bringing in our case, showing what happened in the workplace. And, again, none of these documents are attorney-client privilege in anticipation of litigation. None of them.

MR. YATES: Two quick responses. Sharon Gilligan is vice president who -- only document she saw, only information that she had to make this decision was the confidential investigation, the results of the confidential investigation. And she -- the only question that was presented to her because she was going to be the ultimate decision-maker as to whether this discipline was removed or not removed, based upon the investigation, was that she

thought it was appropriate. And it was going to remain in place. That inquiry alone opens up the whole attorney-client investigation.

Secondly, it doesn't make any difference whether we did an investigation. Mr. Cox has been arguing and Your Honor ruled the other day that there is just not this sexual harassment kind of duty. Even there, it's not a duty. I don't think an employer gets held to liability if they don't do an investigation as a means by which the employer avoids liability under those decisions. So he's still trying to try a case that Your Honor told him is not going to be submitted to the jury. So, we have relevance, we have all the issues of the attorney-client privilege. And I think if we go there, all we're going to do is compound the problems that the attorney-client issues raise.

MR. COX: If I could add, Sharon Gilligan, to avoid anything that I think I could legitimately raise, I have taken the designations of Sharon Gilligan's deposition, and revised. I have shortened them. And I have removed any reference to what she reviewed, any reference to security, any reference to investigations. This version removes all objections that defendants had to things we had designated and includes everything that they designated for cross-examination. We never touch on the issues that Mr. Yates said is the problem. They are not here.

I'd like to submit a highlighted copy which they also have, if that was before, as opposed to trying to follow these numbers, if that --

THE COURT: You can give it here. I won't have time to look at it now.

MR. COX: Well, but my point is, we have completely and intentionally tried to eliminate any issue to avoid that type of controversy. The problem here is Sharon Gilligan said she was reviewing a different issue than what the discipline was issued on. And we think we have every right as a matter of credibility to show the pretext. It was a false reason given for the disciplinary memo.

THE COURT: I know but -- All right. Let's stop. It's five minutes after. After we get the jury picked, we can resolve these issues. I want to get that jury picked so we don't have 24 people waiting around all day.

MR. COX: But we really have gone out of our way to concede everything that we think we can concede.

THE COURT: This thing we want to talk about is -- Get the jury.

It appears to me you're still wanting, you're still trying to go under the steps of the sexual harassment, same as the complaint was made and the investigation was made. I agree with Mr. Yates. They don't have to make an investigation. You've got a disparate treatment case.

MR. COX: We understand that instruction probably will not appear.

THE COURT: Yeah.

MR. COX: We would even be willing to enter into a stipulation if that would resolve it.

THE COURT: Stipulation of what?

MR. COX: For the record that if that for some reason created an issue that there was an EEOC charge filed that they complained about retaliation and that was fully investigated with a decision, no retaliation, we don't want to get into that investigation.

THE COURT: Let's stop. I'm going to go get the jury. Everybody take a five-minute recess while I get the jury panel up here.

(Recess)

(The following proceedings were had IN THE PRESENCE AND HEARING OF THE JURY PANEL:)

THE COURT: Good morning, ladies and gentlemen of the jury. We're waiting. We have one more juror to pick.

What we were doing, there behind that door are some holding cells. When we try criminal cases we have holding cells for the defendants who are in custody. And I don't have a key to that door. That was a U.S. Marshal. We have to have a U.S. Marshal -- we had those tables stored in there. It doesn't affect us in this case. This is a civil

PROCEEDINGS WERE HAD:)
THE COURT: What's your position?
MR. COX: I'm trying to get through it quickly. My understanding is that the major thrust of their case is attacking her credibility whether she did or didn't report what to whom. Explaining the background of what her job responsibilities were and how she handled the situation goes directly to her credibility and what her job actually was.
MR. YATES: But I don't think the details of what happened have anything to do --
MR. COX: That's why I'm trying to avoid --
MR. YATES: Well, she's giving them to you.
THE COURT: I thought you said this took place while she was a contract employee.
MR. COX: Then the end of it came when she was a manager, when Kathleen left for maternity leave. I'm getting out of this issue.
THE COURT: Get out of it then. Ask her a concluding question and get out of it.
(THE PROCEEDINGS RETURNED TO OPEN COURT.)
BY MR. COX:
Q. As a result of these issues involving Mr. Snyder, did you have occasion to call someone in the legal department?
A. Yes.
Q. And who was in that discussion?

A. Kathleen Wilder was part of the conversation, Kim Klosak, and I'm sorry. I don't remember the name of the --
Q. Don Profit?
A. I think that's right.
Q. And what do you recall Mr. Profit saying about the situation?
A. He indicated --
MR. YATES: Objection, Your Honor. May we approach?
THE COURT: Yes.
(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)
MR. YATES: We're getting into legal advice in a matter that was given to her in a position as a manager and another manager in a legal incident that has no bearing to this lawsuit.
THE COURT: Sustained. We don't need to know what he indicated. You might --
MR. COX: All I want to do is get the last question, has to do with Kathleen Wilder telling her to handle the situation and get rid of Snyder.
THE COURT: Let's say what happened as a result of that meeting.
(THE PROCEEDINGS RETURNED TO OPEN COURT.)
BY MR. COX:

Q. On this issue involving Mr. Snyder, did Kathleen give you specific duties on how to deal with the situation at some point?
A. Yes.
Q. And when was that?
A. When she went on maternity leave she had at that time placed him on, I believe it's the third step of a four step process which is final written reminder.
Q. And was Mr. Snyder terminated once you were co-director?
A. Right. As a part of that process.
Q. Did you have any other occasion to deal with personnel disputes including discrimination in 1997?
A. Yes, I did.
Q. What was the next incident?
A. I believe the next incident had to do with Bill Gagnon's promotion.
Q. We're going to come back to that in a moment. Was there another issue yet in 1997 that you dealt with involving personnel issues or discrimination?
A. Yes, there was.
Q. What was that?
A. An e-mail was sent from a manager of another department suggesting that in hiring, my department should not hire people who are retired military.

Q. And who was that person that wrote the e-mail?
A. Her name was Barbara Glover.
MR. COX: I'd like to offer Exhibit 16, Plaintiff's Exhibit 16, Your Honor.
MR. YATES: Defendants have no objection, Your Honor.
THE COURT: Plaintiff's Exhibit 16 will be admitted.
MR. COX: Permission to approach the witness, please?
THE COURT: Yes.
BY MR. COX:
Q. I hand you a copy of what has been marked as Plaintiff's Deposition Exhibit 16. Is that the memo you're referring to?
A. Yes, it is.
Q. Why were you copied on this e-mail?
A. The candidates that were interviewed were from our department. And that was part of my responsibility at that time as acting co-director, to kind of manage the interview process and make sure the right people talk to our candidates.
Q. And you found this e-mail objectionable?
A. Yes, I did.
Q. It's relatively short. Could you, please, read it to

the jury? Just the text.
A. I provided my notes regarding the two candidates I interviewed yesterday in a previous e-mail. The following is a list of things to think about. Both candidates are career military. Both have worked or currently work for the same company, Logicon, so have very similar backgrounds as far as type of experience since leaving the military. I believe that Bill Gagnon has also worked for the same organization. That would make three people with the same basic background in the training organization. Diversity is critical for an organization to grow and thrive. Different skill sets, different backgrounds and experiences are essential in a well-rounded training organization. The organization should reflect the environment in which it is providing training. Hope this helps. Thanks.
Q. After you received this e-mail, what did you do as part of your official job duties?
A. I was reading this e-mail when Jim Keenan, the other acting co-director, came into my office and asked me if I had seen this e-mail. And I said that I was reading it. And we read through it together and discussed it. And he indicated he thought we should draft a response to it. And I told him that I agreed.
Q. Was a response drafted? Was a response drafted?
A. Yes, it was.

Q. And did Mr. Keenan participate in that draft or the review of the draft?
A. Yes, he did.
Q. What was his response to the e-mail before it was sent?
A. He believed it stated our position, our concerns accurately and that we should send it.
MR. COX: I'd like to offer Exhibit No. 17 into evidence.
BY MR. COX:
Q. Have you look at what has been marked as Plaintiff's Exhibit No. 17? Is that the response that you just testified to?
A. Yes, it is.
Q. Is that a true and accurate copy of the response?
A. Yes.
MR. COX: I would ask that Exhibit No. 17 be admitted into evidence, Your Honor.
MR. YATES: This is the one -- may I ask if she knows?
THE COURT: Yes.
MR. YATES: Ms. Meredith-Ball, at the bottom of the exhibit there is page 1 typewritten. Do you see that?
THE WITNESS: Yes, I do.
MR. YATES: Typically in the many e-mails we've seen in these cases, page 1 generally suggests that there is

a second page to it, does it not?
THE WITNESS: Yes, it does.
MR. YATES: Do you know whether this Exhibit 17 contains the entire text of your response to Ms. Glover?
THE WITNESS: It contains the entire text of my response. What is not present is probably this page that probably was part of it, you know how e-mails string together as you send them back and forth.
MR. YATES: I understand that's your speculation. But my question was, as far as you know this is your entire response contained on Exhibit 17?
THE WITNESS: Yes. Probably I said, thanks, Lynn. I probably had my name at the bottom.
MR. YATES: But, again, you're speculating?
THE WITNESS: That was my practice.
MR. YATES: We have no objection, Your Honor.
THE COURT: Plaintiff's Exhibit 17 will be admitted.
MR. COX: Thank you, Your Honor.
BY MR. COX:
Q. Now, without going through the entire text of this, who did you send this to?
A. I sent this e-mail to all of the people who are on the prior e-mail.
Q. And who is Barb Glover? She's the author of the prior

e-mail?
A. Barb Glover is the author of the prior e-mail. Jim Keenan, my co-acting director; A.J. Francis, who was copied on the original.
Q. What was her title at that time?
A. She was the director. She was the director over Barbara Glover's group.
Q. Director level and Glover's boss?
A. Right.
Q. Who else?
A. And I copied myself so I would have a clean copy in my mailbox. I did that frequently. And I also copied Kathleen, which I did.
Q. Did you copy Mr. Mendenhall?
A. Yes. He was on the original too.
Q. He was a vice president?
A. Yes.
Q. Could you just simply read your last paragraph? Where it says third and final?
A. Third, and finally to describe a discrete group of individuals e.g. career military, and make negative assumptions and/or statements about them based on their membership in that discrete group and to suggest that on that basis we should deny them employment or treat them differently than other candidates, can you say

discrimination lawsuit?
Q. Question mark?
A. Question mark.
Q. After you wrote this e-mail did Mr. Mendenhall have a discussion with you?
A. Yes, he did.
Q. How soon afterward?
A. Within a couple days, I believe.
Q. Could you tell the jury about that discussion?
A. Yes. He had his assistant call me and tell me when to come over and I went to his office. And he was upset with me about this e-mail. He told me that I had made Barbara Glover cry. And he told me that A.J. Francis was very upset and angry. He also said, Lynn, women in corporations don't go very far. Often there is kind of a ceiling. But I really thought you had what it took to really advance in this company. And then you turn around and do something like this. And he held up the memo.
Q. Did you tell anyone about that conversation?
A. Yes, I did.
Q. Who?
A. Kathleen Wilder.
Q. Did she advise you whether you should go running to H.R. or not?
A. No. She said that we would talk about it when she got

back which was to be in just a short couple weeks.
Q. So you were talking to her while she was on maternity leave?
A. I talked to her a lot while she was on maternity leave.
Q. Let's go back to Mr. Gagnon's situation for a moment. You had mentioned earlier Mr. Gagnon's job description. Could you explain how his job description was written?
A. Kathleen Wilder asked me, directed me to tell him to write his job description. She was having us do that at that time, writing our own job descriptions when we came into the company because all the jobs were new.
Q. Was it your responsibility to review or edit it?
A. She had me editing and reviewing all of them.
Q. What did you do with that job description? This is a job description for the manager's position, right?
A. Right. The computer-based training manager.
Q. And it had been approved at that point?
A. No. Mr. Mendenhall had ordered us to create it in 1997, now, instead of waiting until 1998.
Q. At that point in time to the best of your knowledge, how well did Jim Mendenhall know Bill Gagnon?
MR. YATES: I'll object to that as calling for speculation on the part of this witness.
THE COURT: Sustained as asked.
BY MR. COX:

Q. At that point in time do you have any knowledge of whether Mr. Mendenhall knew Bill Gagnon at all based upon your observations?
A. I never saw them together.
Q. Go ahead. The last, may not be the last question let me make it a new question. What did you do with that job description?
A. Kathleen had instructed me on the process we would follow. The job description was sent to compensation to have a number value placed on it, a salary amount assigned to it. And also a short term incentive assigned to it because it was a management job.
Q. Did Ms. Wilder explain to you who she had selected for this manager's job?
A. Yes. She discussed it all that previous summer.
Q. And who was that?
A. That was Bill Gagnon.
Q. Was there any indication from Ms. Wilder to you that Mr. Mendenhall made that decision and not her?
A. That Mr. Mendenhall had already decided?
Q. No. That Mr. Mendenhall decided to hire Bill Gagnon, not Kathleen Wilder?
A. Well, the circumstances around his hiring, well, no, she didn't. But the circumstances were that Mr. Mendenhall was the one who ordered us to go ahead.

Q. For the position?
A. For the position.
Q. But not specifically Mr. Gagnon?
A. Actually, yes.
Q. Thank you. Now, when you took this job description, it went to who did you say?
A. It went to compensation.
Q. Is that a part of H.R?
A. I believe it is.
Q. And did you talk to anyone there in compensation?
A. I don't recall voice to voice conversations but I did get e-mails from Linda Rausch.
Q. Did you have any discussions about how to prepare the paperwork that would be necessary to complete the process of Mr. Gagnon's new position with compensation?
A. Yes.
Q. And what was the first discussion you had that you recall?
A. Well, Kathleen had outlined the process for me.
Q. How did she outline the process to you?
A. Well, she said that first we needed to have a position description written. And it had to go to compensation and they put a salary value on it. Then it went, it came back and we were to look at it and then we were talking to a different person in H.R. about the actual salary offer, what

A. It was about $44,000.
Q. Was it $44,100?
A. I believe that's correct.
Q. I think that's --
A. Wait a minute.
Q. What was the recommended increase?
A. The recommended increase was to $66,000.
Q. So for base to base, can you explain to the jury how you would calculate that? I'm going to try to write the numbers that you tell me to write up here.
A. Okay. First, you take the new salary then you subtract the old salary. And then you get the difference. 21,9 something.
Q. Okay.
A. Then you divide the difference into the base, the new base. The one you're targeting. That should be a 6. 66.
Q. Like that?
A. I think that's right, yes.
Q. And what is the percentage you come up with?
A. About 33 percent.
Q. .33?
A. Yes.
Q. Is there another way you could calculate the base salary, base to base?
A. Well, that's the way I was taught to do it. But there

is the way that they used that caused them to come up with 50 percent.
Q. Is there another way to calculate getting the same number? Do you know?
A. There is something to do with subtracting from one but I don't use that method.
Q. Now, when you submitted that paperwork, who did you talk to, who said, no, they wanted this number changed?
THE COURT: Let's have a side bar.
(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)
THE COURT: Let's don't waste a lot of time on how she wants to do math. It's obvious how you figure it the other way. I think the jury knows. And --
MR. COX: This will be the last.
THE COURT: They figured it different. Now, you don't need to characterize it as wrong because she obviously is not a math major. Okay?
MR. COX: I got you.
(THE PROCEEDINGS RETURNED TO OPEN COURT.)
BY MR. COX:
Q. What was the formula that compensation said to use?
A. Compensation divided the difference into the old salary.
Q. That's how the 50 percent was derived?

A. Yes.
Q. Is that what caused the second write up to say 50 percent instead of 33 percent?
MR. YATES: Objection, foundation.
THE COURT: If she knows.
BY MR. COX:
Q. If you know?
A. I do know. I wrote it.
Q. Now, after this was submitted to compensation, what feedback did you get besides that?
A. Julie called me and told me what her recommendation was going to be. She said that she was going to recommend a 25 percent increase to get him within 85 percent of the market reference point at this time.
Q. Did anyone in compensation say that he could not get the M.R.P?
A. No, they didn't say he could not get the M.R.P.
Q. At that point in time did anyone in compensation discuss with you any particular policy or formula that had to be used in determining what he was entitled to?
A. No.
Q. What was your understanding about Ms. Moylan's recommendation of 85 percent of the M.R.P?
A. That was within the 15 percent that was referred to in Linda Rausch's e-mail.

Q. So all the calculations were based upon the original memo within 15 percent of M.R.P?
A. Yes.
Q. Did she make any comments about -- what comments, if any, were made by Ms. Moylan about Mr. Gagnon's ability to get approved at 66,000?
A. She said that based on her calculations, 50 percent, that was high. But -- and I asked her, had she seen any that high come through? And she said not for awhile. But she had seen some especially at the beginning of the company when they were trying to get people in key positions, critical positions. She said we could try for it. I told her, I said to her, that's what Kathleen had asked me to do.
Q. At that point in time had you ever heard of a document called Sprint P.C.S. Salary Management Guide?
A. No, I had not.
Q. When is the first time you ever learned of such a document?
A. A document with that title was included in a packet of materials that was given to me at a manager's training in May of 1998.
Q. I'm going to hand you what has been marked as Plaintiff's Deposition Exhibit 126.
May I approach the witness, Your Honor?
THE COURT: Yes. Yes.

BY MR. COX:
Q. Is this the salary management guide that you just testified to?
A. Yes.
MR. COX: I'll offer this into evidence.
MR. YATES: No objection.
MR. COX: Thank you.
THE COURT: You called that deposition exhibit?
MR. COX: I'm sorry. Plaintiff's Exhibit 126. I tried to get the numbers corresponding with the depositions.
THE COURT: Plaintiff's Exhibit 126 will be admitted.
MR. COX: Thank you, Your Honor, for correcting me.
BY MR. COX:
Q. You testified that the first time you saw this was in a training class in -- when?
A. It was in May of 1998.
Q. You received a manual at that time?
A. Yes, we did.
MR. COX: May I approach?
THE COURT: Yes.
BY MR. COX:
Q. Hand you what has been marked as Plaintiff's Exhibit 43. Is that a copy of the H.R. Policy and Practices Manual

that you received in management training?
A. To the best of my recollection, it is.
Q. And this is the document that contains the management guidelines, salary guidelines?
A. Yes, it does.
MR. COX: I'd like to offer Plaintiff's Exhibit 43 into evidence.
MR. YATES: Object as cumulative. Contains some policies that have already been admitted. Also on relevance of the vast majority of material which has nothing to do with the lawsuit.
THE COURT: Well, I understand your position. I'll admit it but rule it will not go to the jury because we don't need all this.
MR. COX: I understand.
THE COURT: I'm just going to admit it as background material to show the source of the salary reference.
MR. COX: Okay.
THE COURT: Let's make sure. We don't need to bog the jury down.
BY MR. COX:
Q. Is there any discussion at that point in time that there was this document, salary management guidelines, that had to apply to Bill Gagnon?

MR. YATES: Object to the form of question as to what time we're talking about.
MR. COX: Thank you, Jack.
BY MR. COX:
Q. At the time you were initially doing the compensation form?
A. At the time I was preparing it there was no reference to this. And I was unaware it existed.
Q. At any time from this October time frame when you prepared this first compensation exhibit form until May with the training, had anybody ever referenced that document to you for compensation exceptions?
A. No.
Q. After you got that compensation exception form from H.R., what did you do with it?
A. I called Kathleen Wilder and talked to her about it.
Q. And what did she say?
A. She said, let's go and try for the entire M.R.P., to reach the M.R.P.
Q. And so who did you have to go to?
A. I was to go to Jim Mendenhall, who was the vice president.
Q. And what day did you sign Plaintiff's Exhibit No. 9, the compensation form?
A. I signed it on October 1, 1997.

Q. And what date did Ms. Moylan sign it?
A. Hers is dated 10-1 as well.
Q. In relationship to August, excuse me, October first 1997, when did you go talk to Mr. Mendenhall?
A. I think it was a fairly short time after that.
Q. What do you mean by fairly short?
A. Within a couple of days.
Q. Tell the jury about the discussion between you and Mr. Mendenhall when you presented him with this compensation form. What did you say? What did he say?
A. I went to his office. I told him that I had prepared the compensation forms for the position he had told us to fill. And he looked at the face of the document and with all the attachments, and then he threw it back across the desk at me. And he said, I'm not going to pay him that. And then he said, he's a white guy, isn't he? And I said, yes, he is. And he said, if he were a woman or minority, I would have to pay him but I don't have to pay him.
Q. Is there anything else said at that point?
A. Yes.
Q. What else was said?
A. I said to him, please, let me discuss the business case justification with you. And I tried go through some of the relevant points. Because this was something he had said he wanted

Q. And did he respond?
A. He said, I don't care about any of that stuff. If he wants to walk, let him walk. I'm not going to pay him. He's just a white guy. And he refused to take the papers back or look at them at that point.
Q. During that discussion did he indicate what he was going to pay him or willing to pay him?
A. He said, he'll get a ten percent over his base, his current base and that's it.
Q. In that conversation did Mr. Mendenhall reference any policy that he was applying?
A. No, he did not.
Q. After that discussion with Mr. Mendenhall, what did you do?
A. I was shocked that he had said, I'm not going to pay him because he's a white guy. I went back to the office and Jim Keenan, the acting co-director who had seen this, said, well, how did it go? And I said, I can't believe it. He said, he's not going to raise, he's not going to pay M.R.P. because he's just a white guy. And Heather Rogers, the other manager at that time, was in town and she was in the office. And she said, that's terrible. And then I called Kathleen Wilder.
Q. Now, if you could look at Exhibit 126, that's the salary management guide. And turn to page 13. Do you see

there's a number of steps, 1 through 7. Do you see that?
A. Yes.
Q. And step 5. The last two sentences, could you read that where it says, for extraordinary?
A. For extraordinary promotional increases between positions, the maximum total increase should not exceed 20 percent. Please note promotional increases greater than ten percent must be reviewed and approved by the appropriate chief officer or their designee.
Q. Ms. Moylan, in compensation, was her recommendation in compliance with the salary management guide?
MR. YATES: Objection, calls for conclusion.
THE COURT: Sustained.
How does she know? Of her own personal knowledge?
MR. COX: Yeah. This is what she did.
THE COURT: Sustained. Ask it another way.
BY MR. COX:
Q. After reading that, again, what was Ms. Moylan's percentage recommendation?
A. 25 percent.
Q. And that would be above what was in the salary management guide, is that correct?
A. Yes.
Q. Thank you.

Thank you, Your Honor.
Did you call Ms. Wilder that day?
A. Yes, I did.
Q. Tell the jury what was said in that conversation.
A. I said, Kathleen, you won't believe what happened. I took the compensation exception report into Mendenhall and he threw it back across the desk. And he said, I'm not going to pay him. He's just a white guy. I'm not going to pay just a white guy.
Q. I want to clear up, when you say threw it across, it wasn't violent?
A. No. He had a long desk. And he just, you know, slung it so the pages all went.
Q. I just didn't want to give the wrong impression.
A. Not like a ball. But like that.
Q. Go ahead.
A. He said, if -- I just recounted the entire conversation. He said if he were a minority or woman, he would have to pay him. But he's just a white guy and he's not going to pay him. And Kathleen said, that's terrible. I can't believe he said that. What a mess. I'm going to be back and I'm going to fix this. I'm going to take care of this.
Q. Did you have any understanding from that conversation of whether you were to go to H.R?

A. My understanding was that my boss was going to handle it.
Q. Did she ask you to go to H.R?
A. No, she did not.
Q. What did you do next in terms of Bill's compensation?
A. We talked about, I talked with Kathleen about, in that same conversation about reworking this so we could go through again. And that's what I did. I put down on a second compensation exception request form what Mr. Mendenhall told me to put down which was the ten percent.
MR. COX: May I approach the witness?
THE COURT: Yes.
BY MR. COX:
Q. I've handed you what has been marked as Plaintiff's Exhibit 129. Is that the document that you're referring to?
A. Yes.
Q. Now, in this, it says there is a base to base increase of just over eleven percent. Do you see that?
A. Yes.
MR. YATES: Your Honor, again, if we could -- I have no objection but --
MR. COX: I'm sorry. I ask that it be admitted.
THE COURT: The number again?
MR. COX: 129.
MR. YATES: No objection by defendants.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WILLIAM E. GAGNON, JR., Plaintiff,
vs. No. 99-0683-CV-W-1
SPRINT CORPORATION, et al., Defendant. Tuesday, January 23, 2001
Kansas City, Missouri

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE,
and a jury

VOLUME II

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Q. Were there any other employees that she was talking to you about in terms of getting pay raises at that time?
A. Yes.
Q. And what was her comment about that in relation to Mr. Gagnon's request for getting his pay raise?
A. She said she would be able to get pay raises for them.
Q. Did she say why?
A. They were --
Q. No. Did she say why?
A. Yes, she did.
Q. What did she say?
A. She said there were three women and one was a minority and she would be able to get them raises.
Q. At some point in time in 1998 did you express to Ms. Wilder any interest in transferring out of her department?
A. Yes, I did.
Q. And when was that?
A. That was getting on into the summer, mid June, perhaps, and later.
Q. And what was her response to it?
A. She said, well, whatever you think you have to do.
Q. As part of that, did you go to an interview with another department?
A. There were informational meetings. I don't recall specific interviews at that time.

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Q. Do you recall having a discussion with Ed Planco?
A. Yes.
Q. And when was that?
A. I think that would have been in July.
Q. Could you tell the jury about what was discussed in that informational meeting?
MR. YATES: May we approach, Your Honor?
THE COURT: Yes.
(COUNSEL APPROACHED THE BENCH AND THE FOLLOWING PROCEEDINGS WERE HAD:)
MR. YATES: I'm concerned we're going to be trying her case here and unless this is predicate to the porch meeting.
MR. COX: It is. That's exactly what it is.
MR. YATES: If we go into the details --
MR. COX: I'm trying to speed things up, taking out lots of stuff.
THE COURT: Good.
(THE PROCEEDINGS RETURNED TO OPEN COURT.)
BY MR. COX:
Q. Could you tell the jury what was said in that meeting?
A. Ed Planco worked for a director named Bill Pitts and my group and I had done some work for Bill. Ed said to me that they were talking about setting up a team, that they were working on a position description so it wasn't -- hadn't

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been comped, hadn't been approved, any of that. But it was a bid and quote department. It was like an operational job. And they had really liked my work and would I be interested in coming over there? And I said that I would really like to look at it when it was finished and talk to them about it.
Q. Was there any discussion about any other jobs that might be available?
A. Actually out of that meeting or conversation there was a second conversation.
Q. What was said in that conversation?
A. Bill Pitts was present for that and I believe Ed Planco as well. And they talked to me about a whole division that they were going to be standing up in the next few months or maybe even into the next year. That had to do with operational kinds of jobs, auditing. It was in the business division, the business sales area.
Q. What, if anything, were you aware of in your department as far as other employees being interested in transferring to other departments or moving up the ladder?
A. Well, we hired, we had hired people who had said in their job interviews, I just want you to know that I'm looking at this as a foot in the door. I'm coming from a management background. I'm coming in as a developer but I want to move up. And I am ambitious and I'm excited about

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this company. So I knew there were people.
Q. Following these meetings with Mr. Pitts and Mr. Planco, did you send an e-mail to Mr. Gagnon telling him about what you had found out?
A. Yes.
MR. COX: May I, Your Honor?
THE COURT: Yes.
BY MR. COX:
Q. I've handed to you what has been marked as Plaintiff's Exhibit 218. Is this the e-mail series that you were referring to?
A. Yes.
MR. COX: Ask it be admitted into evidence.
MR. YATES: No objection.
THE COURT: Plaintiff's Exhibit 218 will be admitted.
BY MR. COX:
Q. Chronologically, the first e-mail appears at the bottom of the page?
A. Yes.
Q. And what is the date of that e-mail?
A. The date of the e-mail at the bottom is Monday, July 27th.
Q. From whom to whom?
A. There is an e-mail from -- there is actually a meeting

maker e-mail from Ed Planco to me.
Q. And what is --
A. Actually it's from me to Ed Planco in response. I'm sorry.
Q. And what did you respond? What were your words?
A. I said, yes, I will be delighted to attend. Just let me know where the meeting will be. Thanks very much.
Q. Then the next e-mail, what is the date of it?
A. The same date, July 27th.
Q. From whom to whom?
A. I sent it to Bill Gagnon.
Q. And what was your message?
A. It says, I'm jazzed about this, in bold and capital letters, with exclamation points.
Q. Did Mr. Gagnon reply to you?
A. Yes, he did.
Q. Is that the next e-mail?
A. Yes, it is.
Q. What is the date of that e-mail?
A. The same date, July 27th.
Q. And what was his response?
A. He says, fantastic news. I'm so happy for you. Hope it works out the way it's looking.
Q. Do you recall the situation in early August when Mr. Gagnon was on, serving on jury duty?

A. Yes.
Q. Did he ask you to do something while he was serving on jury duty?
A. Yes, he did.
Q. What did he ask you?
A. He e-mailed me his resume from home and asked me to make sure it got delivered to someone who had requested it.
Q. And did you do that?
A. Yes, I did.
MR. COX: May I?
THE COURT: Sure.
BY MR. COX:
Q. I've handed you what is marked as Deposition Exhibit 219. Is that the e-mail that you sent?
A. Yes, it is.
Q. And it's a series of e-mails. They're all on the same date, is that correct?
A. Yes, they are.
Q. What is that date?
A. August 10, 1998.
Q. And these communications are between what two people?
A. They're between me and Bill Pitts.
Q. And who is Bill Pitts in relation to these e-mails? Why are they being sent to Bill Pitts?
A. Bill Pitts was a director in the business area, I said.

Again, he was Ed Planco's boss.
Q. Is this the e-mail where you had forwarded Mr. Gagnon's resume to him?
A. He's asking me to forward, yes, he's asking me to forward it.
MR. COX: Apologize. Ask this be admitted.
MR. YATES: No objection.
THE COURT: Plaintiff's Exhibit 219 will be admitted.
BY MR. COX:
Q. With the information that you had heard in these meetings with Mr. Planco and Mr. Pitts, and you described other jobs that might be available?
A. Yes.
Q. What did you do?
A. I talked to Bill about them. I came back, they had drawn me some rough diagrams of what they expected some of these to look like. They were operational in nature. Some of them were fraud, auditing, negotiating contracts kind of things. I talked to Bill about it. And I said, you know, I'm so excited to share this information. One of the criticisms at that time was that people were finding out --
MR. YATES: Objection, Your Honor. This is non-responsive to the question. Ask it be struck.
THE COURT: Sustained.

BY MR. COX:
Q. As a result of your discussions with Mr. Gagnon, did you talk about what you might do with this information in terms of the other employees in the department?
A. Yes. I wanted to share it with the employees who had indicated that they were interested in moving up the ladder. Some had told me directly they were frustrated with where they were and what they were doing.
MR. YATES: Objection, Your Honor. Hearsay and non-responsive to the question.
THE COURT: Sustained. Hearsay.
BY MR. COX:
Q. Let me go back in time. Do you recall a manager's meeting on June 22, 1998?
A. Yes, I do.
Q. Who conducted that meeting?
A. Kathleen Wilder.
Q. Do you recall any comments that Ms. Wilder made in that meeting about the employees in her department who were former military?
A. She told me --
Q. No. Do you recall that?
A. Yes, I do.
Q. Okay. And what did she say in that meeting?
A. She said to the managers that there was a perception in

the department among some employees that you had to be retired military to get ahead in the department and there was a perception of unfair treatment.
Q. Did anyone respond to Ms. Wilder's comments in that meeting?
A. I responded to her.
Q. What was your response?
A. I asked her about the substance of the comments that had been made, for one. I also said, the problem, Kathleen, is that people with training development skills are hard to find. And the training post at Leavenworth with those people retiring is a natural source for us. And that's why we're getting those people. They have the skill sets that we have to have.
Q. Now, let's move back in time when you were talking to Mr. Gagnon about the information you received from Mr. Planco and Mr. Pitts. What did you and Mr. Gagnon do in terms of communicating this information to other employees?
A. It was a Friday afternoon.
Q. Was that August 7th?
A. Yes, it was.
Q. Okay.
A. And there were a lot of people gone from the department. But we went around and talked, I said to some people, I've got some really good news. I just heard about

some wonderful jobs that may be created in the next few months or even early next year.
Q. Was this a meeting?
A. No. It was just a conversation.
Q. As a manager of the department did you order anyone to come to this discussion?
A. No.
Q. Where did this discussion take place?
A. It was, we went out on the porch of the building.
Q. Is that on the street?
A. Yes.
Q. What street is that?
A. It's on Main Street.
Q. Is that the old Board of Trade building?
A. Yes, it is.
Q. Who was in attendance at that meeting?
A. I went out. Bill Gagnon went out. Steve Hammack went out. Bill Pearce went out. And Cory Aylor went out. And Brian Schlaak showed up later at some point.
Q. About how long did this meeting take place? And I said meeting. I meant discussion. Excuse me.
A. Oh, it couldn't have been more than ten minutes.
Q. What was said? Go in chronological order best you can recall what was said in this meeting, this discussion?
A. I said to them, I'm so excited. I have come back from

a conversation with Bill Pitts and Ed Planco. And they've been telling me about all these operational management level jobs that they're going to be creating. And I think I even drew out on a piece of paper, they say there is going to be a whole group to do this and whole group to do this and whole group to do this. So there will be lots of opportunities. I can't wait. I wanted you guys to know about it because all of you said you wanted to go into management.
Q. Do you recall making any comments about Ms. Kathleen Wilder in that discussion?
A. No, I do not.
Q. Were other people talking in that discussion?
A. Everybody was talking.
Q. The setting, what was the setting? What was the noise level out there?
A. Out on the porch, it's on Main Street. And there is a bus stop right here. And there are fountains. I think they're gone now but there were fountains and the fountains were running. It was very loud.
Q. Is that a place where people would normally go out like to smoke or to talk?
A. Yes.
Q. Was it in the open?
A. Yes.

Q. In that discussion did you ever say that Kathleen Wilder was uncomfortable with the number of former military personnel we've hired?
MR. YATES: I'm going to object to counsel leading. He's been doing it.
THE COURT: It is leading but I'll let him ask that question and accept the answer.
THE WITNESS: No, I did not.
MR. COX: And only one more question along that line, Your Honor, if you please.
BY MR. COX:
Q. In that meeting did you ever state that advancement opportunities did not exist within the department?
A. No, I did not.
Q. Did Mr. Gagnon ever make either one of those comments?
A. No, he did not.
Q. What comments, if any, do you recall were made in relationship to the comments I just read?
MR. YATES: Object to the form of the question. Vague.
THE COURT: Sustained.
BY MR. COX:
Q. What comments do you remember, if any, that anybody said?
MR. YATES: Object to that as calling for hearsay.

with the United States Army?
A. Yes, I did.
Q. When did you actually retire from the United States Army?
A. My official retirement date was January 31, 1997.
Q. And what was your compensation with the United States Army at the time in January of 1997?
A. My total compensation exceeded $74,000 a year.
Q. Could you explain how that would be broken down in summary form?
A. There was salary, subsistence and housing that was all lumped together. I was on a flight status, so I was getting flight pay in addition to that.
Q. How long did you serve in the United States Army?
A. It was 21 years and five or six days.
Q. You filled out an employment application to work at Sprint?
A. Yes, I did.
Q. How many?
A. Two.
Q. When was the first one?
A. The first one was in early January of 1997.
Q. And when was the second one?
A. The second one was, I believe, late January of 1997.
Q. May I?

THE COURT: Yes.
BY MR. COX:
Q. I hand you what has been marked as Plaintiff's Exhibit No. 1. Is that the second employment application that you testified to?
A. Yes, it is.
Q. Have you ever seen the first one?
A. Not since I filled it out.
Q. If you would turn to page two of the employment application; do you see that?
A. Yes, I do.
Q. What information is being asked for there?
A. My employment history, most current employer and previous employers. Immediate supervisors, their addresses, their phone numbers, and the dates of employment and salary. At the bottom additional employment information.
Q. Did you leave any information blank on that?
A. I left the salary information blank.
Q. Why?
A. At that time since I was still in the Army and drawing military pay and working for Cubic, I was on terminal leave, I asked the manager Mr. Keenan that I was interviewing with, how I should fill this out, and he told me to leave it blank and he would find out and get back to me.
Q. Did he ever get back to you?

A. In February.
Q. And what was that conversation?
A. He was going to offer me the position that I had applied for. In fact, it may have been March, but he told me that I could only use the salary information from Cubic.
Q. On your first employment application do you recall filling out the salary information?
A. On that one, I did, yes.
MR. COX: I ask that Plaintiff's Exhibit 1 be introduced.
MR. YATES: No objection.
THE COURT: Thank you. Plaintiff's Exhibit 1 will be admitted.
(PLAINTIFF'S EXHIBIT NO. 1 WAS RECEIVED IN EVIDENCE.)
BY MR. COX:
Q. Did you submit a resume when you applied at Sprint?
A. Yes, I did.
Q. I hand you what has been marked as Plaintiff's Exhibit 2. Is that the resume that you submitted?
A. Yes, it is.
MR. COX: I ask that Plaintiff's Exhibit 2 be admitted into evidence.
MR. YATES: No objection.
THE COURT: Thank you. Plaintiff's Exhibit 2 will

be admitted.
(PLAINTIFF'S EXHIBIT NO. 2 WAS RECEIVED IN EVIDENCE.)
BY MR. COX:
Q. When you were in the United States Army, did you develop any particular expertises that were applicable to the jobs that you held at Sprint?
A. Actually I learned how to be a leader and a manager. I learned operations. My last about 11 years, I take it back, about my last nine years, I worked on computer simulations and computer strengths.
Q. In terms of the curriculum development job that you started with at Sprint, what job skills or experience did you not have that you had to learn once you were at Sprint?
A. The particular expertise in the systems that were involved at Sprint obviously were different than the systems we had in the Army, but the other skills I believe I had.
Q. How about for becoming manager of CBT, were there any skill sets -- what skill sets did you not have moving into the manager's position?
A. I believe I had all of the skill sets that were necessary.
Q. Moving, going through all of the different training and experience, how long did you do computer and training work in the United States Army?

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A. Had over six years of direct experience as an exercise planner and a training developer, an operational officer of a computer-based training and simulations, and I had three or four more years in a consulting capacity.
Q. Were some of those simulations and computer-based training exercises used for combat situations?
A. Almost all of them, if not all, for combat situations.
Q. Were the technological applications any less sophisticated than what was used at Sprint?
A. It was a different kind of computer system. It was a main-frame system as opposed to a client-server system, but it was a very advanced system build by JPL, Jet Propulsion Laboratory.
Q. Did you have the opportunity to make a list of your comparative skill sets of those skills that you had going into Sprint applicable to Sprint, and the skill sets that you had from the military?
A. Yes, I have.
Q. Educationwise, do you have a college degree?
A. Yes, I do.
Q. What is that?
A. I've got a bachelors of science in marketing.
Q. Do you have any additional education?
A. Civilianwise, I have a Master's of Science in adult education.

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MR. COX: May I, Your Honor?
THE COURT: Yes.
BY MR. COX:
Q. I hand you what has been marked as Plaintiff's Exhibit 267. Is the list that you put together?
A. Yes, it is.
MR. COX: I ask that Plaintiff's Exhibit 267 be admitted.
MR. YATES: No objection.
THE COURT: Plaintiffs 267 will be admitted.
(PLAINTIFF'S EXHIBIT NO. 267 WAS RECEIVED IN EVIDENCE.)
BY MR. COX:
Q. Could you explain to the jury what you have put on your list here, on this skill sets?
A. The column on the left was skill sets that I became familiar with or was trained in and practiced while I was in the military.
The skill sets on the right are those that I wrote into the job description, and I was asked to write the job description for the manager of CBT.
Q. In writing the job description for the management position that is referenced at Sprint PCS in October of 1997, what skills or experience were included in your job description that you didn't already have?

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A. None.
Q. When you were initially hired at Sprint, were there any discussions about coming in as a curriculum developer versus a manager?
A. I was very clear on --
Q. Yes or no?
A. Yes.
Q. And what discussions did you have?
A. I was very clear with both of the managers I interviewed with that I was ambitious, and I wanted to ensure that there was, this was a growing company and that there was plenty of opportunity for advancement.
Q. Did you have discussions with anyone about becoming manager prior to becoming manager?
A. Yes, I did.
Q. With whom did you have those discussions?
A. Jim Keenan and Kathleen Wilder.
Q. How early on in your employment after March did you have or before that did you have conc. ming you becoming a manager?
A. I believe it was the May time frame.
Q. At any point in time during those discussions and in applying for a manager's job, did anybody ever mention to you that your compensation would be less because your experience was in the military and not in the private

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corporate sector?
MR. YATES: Objection, Your Honor, that's plaintiff's --
THE COURT: Sustained.
Come on up.
(Counsel approached the bench.)
THE COURT: What is your position?
MR. COX: This is exactly their defense to the Title 7 claim, not the veteran's claim. This is their defense to the Title 7 claim, is what they state was the reason contemporaneous. This is only to the Title 7 claim.
MR. YATES: It shows what you were talking about.
MR. COX: It is the EEOC's response, the company's decision which are based on his experience and qualifications.
MR. YATES: On his competence.
MR. COX: Then it goes down here. Why is he a valued employee, did not have all of the necessary technical position for a manager until the company paid for his training are any different. The same relevance as the relevant and related experience. He demonstrated this is the majority of the experience is as military, and that's within the corporations.
THE COURT: What was the question that you asked him? What did you ask him?

having a conversation, and she was not happy that I was bringing up the pay situation again. And she told me, she quoted her husband as saying that I ought to know better than to piss on the old man's shoes, and then she looked me in the eye and she says, my husband Jim says, you know what that means.

Q. After the January increase and moving into February, how did you feel about the prospects of getting your salary compensation corrected?

A. I wasn't very confident that it would happen, and I wasn't satisfied really with how things were progressing.

Q. So what did you do about it?

A. I became concerned that it wasn't going to be fixed, and I wrote an inquiry or a letter to the EEOC with a timeline, a narrative, if you will, of some of the things that had happened and asked to meet with the counselor.

Q. And did you end up filing a charge of discrimination with EEOC?

A. Yes, I did.

Q. When was that?

A. I believe the date was April 21st of 1998.

Q. Why did you go ahead and file that charge?

A. After talking to the counselor, they felt that I had --

MR. YATES: Objection, hearsay.

THE COURT: Sustained.

BY MR. COX:

Q. Why did you do that?

A. It was recommended by the counselor.

MR. YATES: Objection, hearsay.

THE COURT: Sustained.

BY MR. COX:

Q. In your own mind, why did you do it?

A. To preserve my rights.

Q. I have handed you what has been marked as Plaintiff's Exhibit 14. Can you identify that document?

A. This is the EEOC charge that I filed.

MR. COX: I would ask that Exhibit 14 be admitted into evidence.

MR. YATES: No objection, but I would like to have a bench conference, please, Your Honor.

(Counsel approached the bench.)

MR. YATES: I am assuming that this charge is being proffered for jurisdictional reasons and I would object to it being passed to the jury or sent as an exhibit to the jury during their deliberations.

MR. COX: I don't know that I would honor that request, as long as he is not going to cross-examine him over anything submitted to the EEOC, if he is going to go into that on cross-examination.

THE COURT: All right. I'll let it in, but it is

not to be read or shown to the jury. It is just for jurisdictional purposes.

(Open court proceedings)

Okay. Plaintiff's Exhibit 14 will be admitted, will not be submitted to the jury, it is for jurisdictional purposes.

(PLAINTIFF'S EXHIBIT NO. 14 WAS RECEIVED IN EVIDENCE.)

MR. COX: Thank you, Your Honor.

BY MR. COX:

Q. Describe the work in terms of what was going on after you filed this charge of discrimination?

A. Almost immediately after I filed the charge, the EEOC charge, things went downhill pretty quickly.

Q. What do you mean by downhill?

A. All of a sudden I couldn't do anything right. I had been included in a lot of conversations with Kathleen. She had sought my counsel is probably the wrong word, she had asked me for my opinions on things, what she thought we should do in the future. She would talk to me about the future of the organization, how we can build it up, how we can make it better. She quit all of those conversations.

And she started ignoring me. Some of the other people in the department started avoiding contact with me.

Q. What you just described in terms of how Ms. Wilder was

dealing with you, was it in a private or was it in an open area accessible to others?

A. It was both.

Q. What problems did you have with staying in the department at that point in time?

A. Well, the department was a rumor mill, so I was humiliated as to what was going on. The -- I would walk down the hall and people would avoid me. It became difficult to be a member of a team. It became difficult to work with some of the different folks in the department.

I obviously had lost favor with Kathleen. She started bypassing me, going straight to my subordinates of my team. She can do that as a director, but she had not done that in the past, now all of a sudden she was bypassing me. It made it difficult to manage, some of the other managers were going straight to my team and having them do things. It became a problem for me trying to get the stuff done that I needed to get done on my team and to meet the timeliness that I was being held accountable for.

Q. Did you consider leaving that department?

A. Yes, I did.

Q. What did you do in that regard?

A. I talked to Kathleen either in late June or early July and expressed to her a desire to leave the department.

Q. What was her reaction; what did she say to you?

A. I think my first response was who thinks that. And because she had found out in her one-on-one conversations, which she has with all of her department, she would not reveal the names, which is probably a good thing to preserve the integrity of her 101s, and she said that -- I said, are you going to correct this perception, because it is not true, and she said no, she was not going to correct the perception.

And I said, do people understand that on the system side of the house, those training developers are scarce in the Kansas City area and they have got a tremendous market, and the Fort Leavenworth officers and trainers getting out of the Army that can come down here and would be a good fit. And she said she understood that, but she didn't want to talk about it any more, and she was not -- she left it that she was not going to correct the perception.

Q. By that point in time, had you been involved in making hiring decisions for members of your team and within the department?

A. For my teams, yes.

Q. Did you hire any people who were not formerly in the military?

A. Yes, I did.

Q. Did you hire any women and minorities?

A. Yes, I did.

Q. Who?

A. I hired Annalese Slaughter, I hired --

Q. And describe whether that is a female or minority or both?

A. She is female, she was Caucasian. I hired her on the CBT team, I hired Chandess Childress. She was a white female. I recruited Erin Boot, and she got hired. She was a female minority. I hired Van Regan, who is a white male, non-military. I hired Ken Brantingham, who is a white male and non-military. I hired -- I hired, I don't remember the others, I don't remember if they were before or after this particular point in time.

Q. Afterwards what?

A. Afterwards I hired Connie Wright, she was a black woman. I hired Dean Johnson, he was a white male, non-military. I hired Shawn Haskel, he was a white male and non-military.

Q. Going back to the discussion on the front porch, did you ever make any comment in that discussion about Ms. Wilder being uncomfortable with the number of former military personnel that we have hired?

A. No, I did not.

Q. Did you make any comment in that discussion that advancement opportunities did not exist within our department?

A. No, I did not.

Q. Did you hear Ms. Meredith-Ball make either one of those comments?

A. No, I did not.

Q. Did you hear anyone in the discussion make either one of those comments?

A. I heard neither of those comments made during the discussion.

Q. Was there any discussion at that time about whether a person could transfer before being there a year?

A. Yes, there was.

Q. And who raised that issue?

A. I don't know who raised the issue, I don't see who asked the question, but somebody asked about the one-year requirement, and I don't recall who responded. It might have been me.

The response was you can always ask to leave. You can always ask to apply for a position. If you have been in the position for less than a year, it takes the vice-president to approve it. But we were talking about positions that were going to be created possibly next year; we weren't talking about real positions.

Q. Was there any negative comment made about Ms. Wilder in response to that question?

A. No, there wasn't.

Q. In fact, after that point in time, in 1998, were there people in the department who had been there less than a year that did get approval to transfer out?

A. Yes, there was.

Q. Who were those people?

A. Steve Hammack, Jerry Simonsen, Brian Schlaak. I think prior to this time Cindy Kanenbley and Jennifer Hardin both transferred with less than a year.

Q. At some point in time were you called in to a discussion with Ms. Klosak and Ms. Wilder about this porch discussion?

A. I was called into --

Q. Yes or no?

A. Yes.

Q. Do you recall when that was, approximately?

A. August.

Q. Tell the jury what was said in that meeting, who said what first, and who said what next?

A. It was called -- I walked into the room, and I was told that this was an information gathering meeting by Ms. Kim Klosak. As I walked into the room, it was a round table with four chairs. The room wasn't much bigger.

Ms. Klosak was on the right, and Kathleen Wilder was directly across the table. And she started off by

version, and they did what we had proposed, a redacted version that took --

THE COURT: Okay. I remember that. All right, thank you.

(The proceedings returned to open court.)

BY MR. COX:

Q. Following the receipt of your written reminder, did you raise any additional issues about what was happening to you in the workplace? Did you do anything in writing with Ms. Wilder?

That was a bad question, let me ask you again. Did you continue to have problems with Mr. Keenan in the workplace?

A. Yes, I did.

Q. Did you inform Ms Wilder of that?

A. Yes, I did.

Q. Did you put that in an e-mail?

A. Yes, I did.

Q. I hand you what has been marked as Plaintiff's Exhibit No. 87, is that the e-mail to which you are referring?

A. Yes, it is.

MR. COX: And I ask that it be admitted into evidence.

MR. YATES: No objection, Your Honor.

THE COURT: Plaintiff's 87 will be admitted.

(PLAINTIFF'S EXHIBIT NO. 87 WAS RECEIVED IN EVIDENCE.)

MR. COX: Thank you, counsel. Thank you, Your Honor.

BY MR. COX:

Q. What is the date of this e-mail?

A. September 21, 1998.

Q. And it is really short, could you read the text of the e-mail to the jury, please?

A. Kathleen, for about six weeks now there has been a very perceptible change in Jim Keenan's attitude toward me. He no longer includes me in conversations and has cut me out of the loop in going to some of my team. He has only spoken to me on five or six occasions. All but one of those were business related. This morning as we passed in one of the aisles, I greeted him and he just walked past without a comment. I don't know what the problem is, but I am getting frustrated. I would like the hostility to stop. Is there something that can be done to correct the situation? Please advise.

Q. Did she respond to you on this e-mail?

A. No, she did not.

Q. Following receipt of your written reminder, did you make continued efforts to seek a different position within the Sprint organization?

A. Yes, I did.

Q. Did you seek approval from Ms. Wilder?

A. Yes, I did.

Q. Based upon your written reminder, what was your understanding of the first step of obtaining approval?

A. I had to get vice-president approval in order to apply for other positions, and in order to do that, I needed to go through Kathleen.

Q. Was that explained to you?

A. No, that was not.

Q. Was that your understanding based upon the other people who had transferred out of the department who had to obtain vice-president approval?

MR. YATES: Objection, Your Honor, it is leading and suggestive.

THE COURT: Sustained, leading.

BY MR. COX:

Q. What was your understanding, based upon others that had transferred out?

MR. YATES: The same objection, foundation.

THE COURT: Sustained, lay the foundation.

BY MR. COX:

Q. Did you have an understanding?

A. Yes, I did.

Q. What was your understanding?

A. My understanding was that all of the communications to the vice-president should go through Kathleen. I had seen her in the past get upset when it was not done.

Q. Did she give you that approval?

A. No, she did not.

Q. I will hand you what has been marked as Plaintiff's Exhibit No. 50. Is that the e-mail to which you were referring?

A. Yes, it is.

Q. And the lower e-mail is yours to Ms. Wilder?

A. Yes, it is.

Q. It is relatively short. Would you read it to the jury, please, and indicate what date?

A. The date is Wednesday, October 7th, 1998. From me to Kathleen Wilder.

Kath, on August 11th I sent you an e-mail letting you know that I was interested in some new positions that Mike King may have opening up. Mike had invited me to apply for one of the manager positions recently approved. Here is a candidate interest form and my resume, and I hope that you will support me in this process and forward my paperwork to John with a favorable recommendation that he sign this form.

John was John Garcia, the vice-president.

MR. COX: I am sorry, did you have any objection?

I thought that I offered it.
MR. YATES: If he offered it.
MR. COX: I would offer it at this time and ask it be admitted into evidence.
THE COURT: Number?
MR. COX: Fifty.
THE COURT: Plaintiff's Exhibit 50 will be admitted.
(PLAINTIFF'S EXHIBIT NO. 50 WAS RECEIVED IN EVIDENCE.)
MR. COX: Thank you.
BY MR. COX:
Q. And what was Ms. Wilder's response to you and the date?
A. She responded on October 7th, the same date. Bill, you have been on corrective action for less than six weeks. This was in reference to a trait that was transferred from job to job rather than a particular skill set. Therefore, I will not support an exception to company policy at this point in time. Kathy.
Q. Did Ms. Wilder ever explain to you what this trait was that she was referring to?
A. No, she did not.
Q. At any time during the discussion with Ms. Klosak and Wilder where they are asking you about the porch discussion, did they make any accusations towards you about it being

improper to have people come out and have a discussion on the porch?
A. No, they did not.
Q. Was that topic at all raised?
A. No, it wasn't.
Q. After you received the written reminder to the situation you earlier described of how you were being treated in the workplace change?
A. Would you say that again, please?
Q. Yes. After you received the written reminder, you earlier described what happened after you filed the EEOC charge, after you received the written reminder, did anything change in the workplace as to how people were treating you?
A. I felt like things got even worse.
Q. How so?
A. The hostility became more open. The people -- the people would be more averse. If I would come down an aisle, they would leave, they would go in other directions. People who used to be friends of mine were no longer friends. The phone calls stopped. The e-mails stopped. We quit going to lunch or going out after work together. The co-managers, the peers of mine continued to go more frequently to my team to coordinate and try and to get them to do things and I became, I started having more of a management problem with

my team, trying to keep my team focused on creating new-based training that we were supposed to do.
Q. How did that make you feel?
A. I was very frustrated. And frankly, my self-esteem wasn't too good at that point in time.
Q. How did you feel about your reputation at that point?
A. My reputation suffered. People quit asking me for my opinion. They quit asking me questions. When we were in meetings if I would say, make a comment or a suggestion, it went ignored. People would just go on to the next topic.
Q. Had anybody in management up to this point in time brought any issues to you about your performance, negative issues about your performance as the CBT manager?
A. Nobody brought anything negative to me about my performance.
Q. Continuing, did you work then through 1999; is that correct?
A. Pardon me?
Q. You worked through 1999 in the same position?
A. Yes.
Q. What issues were brought to you by management that were negative about your performance throughout all of 1999?
A. None.
Q. Did you win any awards for Sprint as a result of your work?

A. Yes, we did.
Q. What award did you win?
A. We used a software called Quest, Net Plus, where building our computer-based training, and Allen Communications posts a conference every year, and in August of 1998 we took second place in the international competition of computer-based training products, which was, this was eight months after I started the team up.
Q. Were you ever asked to financially indicate what cost savings were gained for the company by the work of your team?
A. Yes, I was.
Q. And when was that?
A. I was asked in 1997 to forecast what a return on investment would be for the team. And I was asked in 1998 to do a return on investment for the following year.
Q. What were the results of those forecasting and the results?
A. The forecasts, the return on investment that I did in 1997 forecasted that the computer-based training team could save Sprint PCS between .8 and $1.2 million per year in training costs.
Q. And what were the results?
A. The results at the end of 1999, and it went from January to December, a full calendar year, was we saved the

the company $3.8 million.
Q. What did management tell you about that accomplishment?
A. They were excited.
Q. What impact does that have on the working relationship within the department that you earlier described?
A. The relationship didn't change. My team grew. We wanted more computer-based training so that we could save more training, but the relationship did not change.
Q. At some point in time did you file a second charge of discrimination with the EEOC?
A. Yes, I did.
Q. When was that?
A. I believe it was November of '98.
Q. What was the basis of that charge?
A. I alleged Sprint PCS had retaliated against me.
MR. COX: With the same understanding that we had to the prior EEOC charge, I'll offer Plaintiff's Exhibit 42 into evidence.
MR. YATES: With the understanding that we had on the first charge, we have no objection.
THE COURT: Forty-two will be admitted as to jurisdiction only.
(PLAINTIFF'S EXHIBIT NO. 42 WAS RECEIVED IN EVIDENCE.)
BY MR. COX:

Q. During any of 1998 did you get that 10 percent increase that Mr. Wilder had drawn out for you?
A. No, I did not.
Q. You had earlier mentioned that you had different discussions with a person named Phillip Bowman, do you recall that?
MR. YATES: Your Honor, may we approach?
THE COURT: Yes.
(Counsel approached the bench.)
MR. YATES: We are going to get into another area that we have already talked about, these 14 jobs that he has applied for and he is not seeking any relief for. He just wants to lay out the fact that he had gone there and applied for a bunch of those jobs.
He has got absolutely no foundation that anybody knew about any of these charges of employment discrimination, and he is seeking substantive relief. If all he wants to do is post them, he has got to have some sort of submission before laying these out.
And we talked about that before. We had a motion pending. You deferred the ruling on it, but I don't want to come up here for every one of these, and this was one of the first ones, and we are going to have a fight about all of these. He is not claiming relief for any one of these jobs, and he didn't have any foundation to or basis to believe

that any of these were retaliating against him because of his having filed an EEOC charge. He is just, this is a collateral issue to the core issues in this case, and we would object to it.
THE COURT: What is your position?
MR. COX: There is no challenge to the foundation on the document itself. It was primarily drafted from the summary document that Sprint provided updated. My position on that is that: One, it goes to the totality of the circumstances, and it also goes to the drawing inference that those others were able to transfer out. There was awards, good performance and good qualifications, he was simply unable to get a transfer to a position, that the jury is allowed to draw a reasonable inference there from that information. The fact that we are not arguing as damages out of that has no bearing.
THE COURT: But you are going to have to lay some kind of foundation that he was qualified for these jobs, and he wasn't just building his litigation file, which is what it sounds like, so I don't want to do that in front of the jury, so I assume we'll have to --
MR. YATES: If this gets in, we are going to have 14 or 15 witnesses.
MR. COX: Can I have him testify that he applied for a certain amount?

THE COURT: No, lay a foundation that he was qualified for every one of these jobs.
MR. COX: He can lay a foundation that he believes that he was qualified for all of those jobs.
THE COURT: I am going to sustain the objection. This is a collateral matter. We don't need to get into that. He has already testified that he has applied for two or three jobs and he got dressed down by Ms. Wilder and he can't apply within six months. I don't know what else you need. This thing is self-bolstering, prepared for the purposes, it appears to me, that he applied for these, for purposes of litigation; and I am not going to let them in.
MR. COX: We would, if we could, please, we would proffer Exhibit No., Plaintiff's Exhibit 268, for the purpose as stated. We think that it's prejudicial to the plaintiff not to have this in there. We think that it's critical in the development of the case, and it would be a proper issue of fact for the jury to define and determine, if there were any inferences to be drawn.
THE COURT: All right, thank you. Offer made and denied. The ruling has been made.
MR. COX: This is one document. Before that gets going, I was proposing what is Plaintiff's Exhibit 33.
He has already testified that he had previous discussions with Mr. Bowman about his interest in having him

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WILLIAM E. GAGNON, JR., Plaintiff,
vs.
SPRINT CORPORATION, et al. Defendant.

No. 99-0683-CV-W-1

Wednesday, January 24, 2001
Kansas City, Missouri

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE,
and a jury

VOLUME III

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Proceedings reported by computer stenography; transcript produced by computer.

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Q. If the position materalized and they had been there less than a year and wanted to apply for that position, they would have to have had Kathleen Wilder's permission, correct?
A. That is correct, yes.
Q. As I recall your testimony, you selected this group because they were people who had expressed interest in upward mobility and had a skill set that you thought was consistent with these undefined jobs, correct?
A. That's correct.
Q. This wasn't a random walk-by, you happen to be here, I am going to tell you about these job opportunities, you picked the people and Lynn picked the people that you wanted to have go outside and talk to you, correct?
A. We picked the people that had expressed an interest and had the skill sets that had been indicated by Ed Planco would be wanted for these positions.
Q. What kind of information that you had to share could have been shared by anybody?
A. It could have been, yes.
Q. But you thought it would be better to do it outside in person?
A. It was common practice.
Q. Just so the record is clear, both you and Lynn Meredith-Ball were supervisors at the time of this meeting

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in August of 1998?
A. That is correct.
Q. And the four individuals that were talking to you were not supervisors, they were employees who reported to people like you and Lynn?
A. They were also friends of mine.
Q. Now, are you -- did I understand your testimony to be that you deny that you said -- let me see if I've got it here in my notes -- that Kathleen Wilder was uncomfortable with the number of military in the department?
A. Do I deny that I said it?
Q. Yes, sir.
A. Absolutely.
Q. But you had that perception, didn't you, about Kathleen?
A. She told me that she had, that she was uncomfortable with it.
Q. In that June meeting?
A. She told me in a one-on-one.
Q. That she was uncomfortable with the number of military in that department?
A. Yes.
Q. And that one-on-one meeting would have happened before this August 7th, 1998 meeting, correct?
A. Yes.

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Q. And you deny saying that there were no opportunities for former military people in her organization?
A. Absolutely I deny that.
Q. And you didn't tell them, as I recall your testimony, that if they wanted to get ahead they needed to look outside Kathleen's department for opportunities, because those opportunities didn't exist in her department because they were retired or former military; you didn't say that?
A. No, I didn't say that.
Q. And Lynn didn't say that?
A. No, she didn't.
Q. If people in that meeting reported that that's what you and Lynn said, would those people be lying?
A. Yes, they would.
Q. Now, as I recall some of the testimony that you gave when you were talking to Mr. Cox, your testimony on direct examination, that you had had problems in the past and were bothered by the fact that Mr. Keenan would come and talk to your employees directly, correct?
A. That is correct.
Q. And there were also situations that you were upset because Kathleen Wilder would go and talk to your employees directly without going through you; is that right?
A. That's correct.
Q. And it is a fact that you felt that that undermined her

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ability to manage, and you found it to be humiliating, and it was jeopardizing your ability to do the job that you had been given to do; that's how it made you feel, right?
A. When they gave them different tasks, yes.
Q. Wouldn't you expect Ms. Wilder to have that same feeling when she found out what you did out there in that meeting?
A. No.
Q. Now, you understand that the person who blew the whistle, for want of a better term, was Mr. Pearce, right?
A. Yes.
Q. And he came away from that meeting with a perception, didn't he, at least as far as you know from the discovery in the case, those three things that I just asked you that you denied saying, were said out there on that porch?
A. No, they weren't said out there on the porch.
Q. You don't have any reason to believe that Bill Pearce is discriminating against you on the basis of your male gender or -- your male gender or your white race; do you?
A. No, I don't.
Q. And you hadn't shared with Bill Pearce the fact that you had filed an EEOC charge back in April of 1998; did you?
A. I hadn't told him, no.
Q. So he had no knowledge when he started this whole process, the investigation, that you had filed a charge for

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involving a 20 percent within, or a 10 percent within; that's all I am asking? Is it there or not?
A. This is the same answer that I had. No, not within what you have selected.
Q. Now, going back to what is page seven, the paragraph begins the relationship of an employee's salary?
A. Uh-huh.
Q. Could you read the last sentence of that paragraph?
A. The company's decision to offer a salary at the lower end of the MRP range was based upon his experience and qualifications, not on discriminatory reasons.
Q. The next category you have got titled Sprint PCS salary guidelines applied to Gagnon; do you see that?
A. Yes.
Q. Could you read that first introductory sentence?
A. Analysis. An analysis of these Sprint PCS primary salary guidelines as applied to Gagnon refutes his claim of discrimination.
Q. And do you see that, Ms. Martin?
A. I am assuming.
Q. This is the last sentence that you read was right here?
A. That's right. I won't be able to read from that, but if it is the same as this, this is fine.
I need to get to the eye doctor.
Q. Then it has a paragraph that says number one, manager

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assessment of individual performance; do you see that?
A. Yes, I do.
Q. And could you -- the second sentence begins with while Gagnon; can you read that please.
A. While Gagnon -- and I want to just explain this, we always refer to people by that last name -- I meant no disrespect to Mr. Gagnon.
Q. I would infer no disrespect, and I understand that.
A. While Gagnon is a valued employee, he did not have all of the necessary technical expertise for the management position to which he was promoted until the company paid for his training. Nor did Gagnon have the same level of relevant or industry-related experience.
Q. The next sentence.
A. As demonstrated by Gagnon's resume, the majority of his experience before Sprint PCS was in the military. His counterparts had extensive training and experience within corporations. And then I referenced the exhibits that were attached that reflected that.
Q. Thank you very much.
If you could turn to the next page, and in the lower full paragraph that begins with his salary; do you see that?
A. Yes.
Q. Salary manager. Could you just read that first

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sentence please.
A. This salary management process was explained to Gagnon in January of 1998 by Wilder, and again that's Kathleen Wilder. Gagnon was also advised that if business considerations allowed, and if performance expectations were met, another increase would be requested within six months or July of 1998.
Q. There has been a lot of reference to calculations. You have been sitting here, so I will take advantage of the fact that you have heard the testimony, if that's all right, Ms. Martin?
A. That's fine.
Q. There has been a lot of reference about 50 percent this, and 30 percent that, and 33 percent that, in relation to what his increase is; are you aware of that?
A. Yes, I am.
Q. Is there anywhere in this position statement where it spelled out what Mr. Gagnon's salary increase was, 50 percent?
A. Well, I will first state that I don't have the exhibits attached.
And I believe that the exhibits that I attached were some of the larger blowups that we had, that indicated the 50 percent mark that had the line through it. And so given that I wasn't the person that wrote this thing, the

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things that were attached to it, I intended to be part and parcel of this.
Q. And I understand that you are in the position of the people providing you the information, but is there anywhere in the text of the description where it is referenced that there is the issue of 50 percent?
A. A lot of percent increase is measured, but the 50 percent within the text of the document, I don't see that.
Q. Now, if you would look at this page, and do you see the footnote down here, that is the page?
A. Teach me how to number the pages?
Q. Okay.
A. Okay, where it says two additional?
Q. Yes. Do you see that?
A. Yes, I see that.
Q. Can you read, you have two subnotes there; could you read subnote one, please.
A. Which part? Can I read the full sentence, since it is part of that sentence.
Q. Yes, you may, and that's fair, thank you.
A. Two additional compensation issues related to Gagnon are worth noting.
One, Gagnon received a considerable increase above his former salary, and this percentage increase is not reflected in the 33 percent increases in salary Gagnon has

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A. He was brought in at about a thousand dollars less than his peers, based upon his lack of business experience.
Q. And this was after he had become a manager, correct?
A. Yes.
Q. Is that a typographical error? Wasn't he actually brought in at $10,000 less than his peers as managers?
A. No.
Q. Wasn't he, when he was made manager, wasn't he paid $10,000 less than Mr. Keenan and $10,000 less than Mr. Snyder had been paid in '97?
A. I'm sorry, you are confusing me, Mr. Cox. Are you talking about his initial pay, when he was hired as an employee, and I later found out that that was inaccurate.
Q. That's my point. He wasn't paid a thousand dollars less than other curriculum developers; was he?
A. No.
Q. But he was paid $10,000 less than Mr. Keenan and Mr. Snyder, and about $50,000 less than Ms. Meredith-Ball in '97 as a manager?
A. I don't know that.
Q. But you know that this was a typographical error?
A. No, it was inaccurate, because I didn't have the file at the time to reference it.
Q. Could you turn to the last page and read the last page to the jury, please.

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A. It is my intention to process an exception report for Bill in June, to be effective six months from his previous salary change, based upon his current performance.
Q. So that had to be drafted either in June or before June of 1998?
A. I would guess.
Q. And did you ever process that exception form?
A. I started to.
Q. But do you ever process it for him?
A. No.
Q. Did he ever obtain that additional compensation that you are referencing here?
A. No.
Q. If you will turn to the second page, it appears that this is going in chronological order, and if it's not, at any time please correct me.
Go ahead. Did you have a comment?
Let me go ahead and ask the question. Do you see the paragraph that says sometime while I was --
A. Yes.
Q. Do you see that? Would you read that to the jury please.
A. Sometime while I was on short term disability leave, Lynn called me at home and said we had major problems with Bill's compensation. She said that due to the promotion process, we had a potential salary issue. I talked with Bill and explained that we might have to do an incremental process on his salary, and that I would work through the process. He said that he understood and appreciated the support.
Q. So while you were on -- that was maternity leave, you were on a short term disability leave?
A. Yes.
Q. Do you recall Lynn Meredith-Ball calling you at home after she had talked to Mr. Mendenhall about Mr. Gagnon's compensation?
A. I am not exactly sure with the way that you phrased the question I can answer it that way. She did call me at home. I don't know if it was after the conversation with Mr. Mendenhall.
Q. And then it says that you have talked with Bill and explained that we might have to do an incremental process?
A. I actually did that before my maternity leave.
Q. So you are saying that that statement in this letter was referencing a conversation that you had with Mr. Gagnon prior to going on maternity leave?
A. Yes.
Q. Go down two paragraphs and then it picks up again, it would appear to be chronological, it says when I returned from maternity leave; do you see that?

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A. Yes.
Q. Could you read the first two sentences there.
A. When I returned from maternity leave, it was obvious from Bill's demeanor that he was unhappy. I spoke with him and told him that I was sorry that he was not happy about his promotion.
Q. Go on.
A. He told me that Jim Mendenhall said some negative things about him.
Q. The next sentence.
A. He said that Jim Mendenhall said he didn't need to pay him the MRP because he was a white male and could be easily replaced.
Q. Your next sentence.
A. I was quite horrified by the statement.
Q. Is it your testimony that the first time that you heard about the white guy comment was after you returned from maternity leave?
A. Yes.
Q. Is it your testimony that Lynn Meredith-Ball did not call you at home while you were on maternity leave and tell you about that discussion with Mr. Mendenhall?
A. Yes.
Q. Is it your testimony that you did not call Mr. Gagnon while you were on maternity leave and talk to him about what

Mr. Mendenhall had said?
A. I called Mr. Gagnon, left him a voice mail. He did not return my call.
Q. So you did not talk to him personally while you were on maternity leave about the compensation issues?
A. That's correct.
Q. And that's your testimony?
A. Yes.
Q. If you go back to page one, the first paragraph, the last sentence, could you read that please.
A. Most of his experience was in the military, and his counterparts have had extensive training within corporations.
Q. Were you indicating that had some relationship to the amount of money that he should be paid for his job?
A. No.
Q. But the prior sentence says that he was brought in at about a thousand dollars less than his peers based upon a lack of business experience. Most of his experience was in the military, and his counterparts had extensive training in corporations.

Is it your testimony that your comment was not referring that his compensation was somehow based upon his military experience versus private corporation?
A. My comment is that statement about his compensation was

inaccurate.
Q. In fact, Ms. Wilder, you did not know what level of experience Mr. Gagnon had in computer-based training when he was made manager; did you?
A. No.
Q. And you never made any inquiries of Mr. Gagnon as to the level of experience and technical skills he had with the computer-based training and simulation operations; had you?
A. No.
Q. In fact, you don't know of any additional training that Mr. Gagnon had to receive after he came to Sprint to do the job that he was given as manager of CBT training; do you?
A. Well, I know that I sent him to a lot of training after he got the job, and encouraged him to do that so --
Q. Was that training to gain skills and technical skills for his job that he didn't previously have?
A. Some, and some before he even got the job.
Q. And what were those?
A. I sent him to two different software courses --
Q. Let me just ask you -- I'm sorry -- please go on.
A. Two different software courses, so that he could work on the, learn the computer code and the programming and be able to make a decision as to which software we should use and be able to implement it. And then I also sent him to other seminars.

Q. But training just to learn one software versus another software; that was what the training was about, correct?
A. That was one, but there were other trainings.
Q. What other technical skills training was he sent to, to obtain the skills that he needed to be the CBT trainer?
A. He was sent to training at Virginia Ostendorf's, and there were other interactive distance learning.
Q. Did you have an understanding that he learned something there that he didn't already know?
A. Yes.
Q. What was that?
A. He came back excited about all of the possibilities that could be done through interactive distance learning, and the development process that Virginia Ostendorf had, and he wanted us to make all of our curriculum changed so that we were using that development process.
Q. Again, that was applications of programs, correct?
A. No. That was actual basic curriculum development.
Q. The actual things that were going to be developed for the phone industry?
A. No, the skill set to build the curriculum.
Q. What skill set, what technical skill set was he learning there that he didn't already know?
A. The skill set that would use interactive distance learning, so that you chunked things into small components,

so that you could make it engage into someone who was learning from a distance, so that I didn't just go blast one extreme when I'm doing a computer-based thing or interactive distance learning.
Q. Did you know that Mr. Gagnon had prior experience in interactive-based training like that?
A. He did not say that he had when he came back from working with Ms. Ostendorf.
Q. So that was your speculation that he learned that there?
A. He told me that he had learned it there, yes.
Q. An application?
A. He was excited about what she taught him.
Q. If you go to the last page of that document, in that first full paragraph, about three lines up, it says I showed him -- I showed him a set of stickies?
A. Yes.
Q. Can you read that sentence please.
A. I showed him a set of stickies that had each step that I would be willing to recommend based upon his performance.
Q. And were those the stickies that were referenced in that earlier exhibit about the 15 percent, the 2 percent, the 10 percent?
A. I don't know.
Q. I am going to show you what has already been admitted

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RESUMED THE STAND AND TESTIFIED FURTHER
CONTINUED DIRECT EXAMINATION
BY MR. COX:
Q. Ms. Wilder, I believe just before the lunch break I had asked you a question that if the decision to discipline Bill and Lynn had been just left up to you, what your decision would be, and if it would help refresh your memory, I would refer you to page 114 of your deposition in Volume I?
A. Yes, sir.
Q. And if it were left up to you, and you alone, would you have disciplined them?
A. In my deposition I said at the time that I don't know. When I realized everything that I went through as a result of that decision, I still would do it today.
Q. Did someone make a recommendation to you that you issue the written reminder to Mr. Gagnon?
A. No. I consulted with HR about the seriousness of what had gone on and with that counseling, I made the decision, yes.
Q. And who were you talking about?
A. Kim Klosak.
Q. Didn't she give you a recommendation that they be disciplined?
A. She concurred that it was a serious thing, and that a written reminder was appropriate.

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Q. Mr. Pearce was one of the people that you talked to about this discussion out on the front porch; is that correct?
A. Yes.
Q. Prior to this interview with him, did you recall an incident at the work-related function where he became intoxicated?
A. Yes.
Q. Was that a concern to you?
A. I am not sure, I don't know how much he really drank, and I don't know if he was really intoxicated.
Q. Did the situation make you nervous?
A. Yes.
Q. Do you recall telling Mr. Gagnon earlier in 1998 that you didn't think that Mr. Pearce should be hired?
A. Yes. May I clarify when I said that? When he interviewed for the position the first time.
Q. Were you ever critical of Mr. Keenan's performance, especially in the latter part of 1997 and the early part of 1998?
A. I had concerns about Mr. Keenan being able to get all of his projects done.
Q. Did Mr. Keenan know that?
A. Yes. He had an enormous amount of work, and we were trying to get a lot of things that we were doing in

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catch-up, and he needed to get some things accomplished.
Q. In 1998, did you consider Mr. Gagnon to be a good employee as a manager?
A. Yes.
Q. And did that opinion of his performance and his job ever change throughout his entire time under your direction?
A. No.
Q. Now, when you heard about this porch incident, you heard about it from two people, correct?
A. Correct.
Q. Who were those two people that you heard about it from?
A. I heard it first from Dale Coffman and then later Jim Keenan.
Q. And those two people were not even involved in the discussion at issue; were they?
A. That's correct.
Q. And you believed them based upon the reports that they came to you with?
A. I believed that I needed to call HR and do something about it, yes.
Q. Did you believe them when they told you that this had happened, and what had been said about you?
A. I don't know. I think all I knew at the time was, this was something that I had never been anywhere in this kind of situation before, and I knew that I needed help from HR.

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Q. By this point in time, had Mr. Keenan came to you and told you that he thinks Bill and Lynn were conspiring against you?
A. Mr. Keenan had told me that Bill was trying to create a reverse discrimination lawsuit against the company and had enlisted his help, and Mr. Keenan has refused to participate at that time.
Q. He had already come and told you that?
A. I believe so.
Q. And prior to issuing a written reminder, you knew that Mr. Gagnon was seeking the opportunity to transfer out of your department?
A. Prior to the written reminder, I had helped Mr. Gagnon try to get a position out of my department through a promotion.
Q. But you knew that he was looking at other opportunities?
A. Yes.
Q. Now, several people transferred out of your department in 1998; didn't they?
A. Yes.
Q. Mr. Hammack transferred out of your department; didn't he?
A. He did.
Q. And --

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A. Actually he was promoted, which is different than transferring.
Q. He transferred to a different department, but it was as he got a promotion in that process?
A. Yes, he was promoted.
Q. And how many jobs did he seek before he was able to find a job outside your department?
A. I don't know.
Q. If it would help refresh your memory, could you look at page 179 in your deposition, lines 17 to 19.
A. And I said in my deposition, as far as I know, only one, which is the one that he got. I don't know if he posted for any others or interviewed for any others.
Q. And he went from a non-management position to a management position with that, seeking that one transfer; is that correct?
A. He got a promotion to a manager title with no direct reports, so I don't know how you define management position.
Q. And Jody Burnette also transferred out of your department with a promotion, correct?
A. Yes.
Q. Do you believe that there was more than one transfer request or candidate interest request that she applied for in getting that promotion?
A. I believe so. She had posted for a position within my

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department. She had transferred out, and I think after my deposition I remembered one other position that she had expressed interest and posted for.
Q. So with those, with just two or three, she was able to get a promotion?
A. I only know of those, but it could be more, I don't know.
Q. Brian Schlaak, he transferred out of your department?
A. He was promoted out of my department as well.
Q. He got a promotion in management from a non-management position, correct?
A. Again, he got a manager title with no direct reports.
Q. That's a good qualification, thank you.
And how many positions did he apply for before he was able to transfer out?
MR. KNITTIG: Objection, Your Honor. May we approach? The objection is relevance. May we approach?
THE COURT: Yes.
(Counsel approached the bench.)
MR. KNITTIG: We are getting to the point where he is talking about what everybody was promoted to, what jobs they went to, except the plaintiff.
MR. COX: I won't ask any more questions about that.
THE COURT: All right, thank you.

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(The proceedings returned to open court.)
BY MR. COX:
Q. If I recall, there was an issue about Mr. Pearce reporting to you that someone in this discussion made a comment that you probably wouldn't be around much longer; do you recall talking to Mr. Pearce about that?
A. Yes.
Q. And he said that someone made that comment in the discussion, correct?
A. He said it was Bill or Lynn.
Q. But he didn't know who?
A. No.
Q. Now, if one of your managers made a comment that you probably wouldn't be around much longer, is that something that you think is worthy of disciplining an employee for having made such a comment?
A. I believe in my deposition I said I don't know. If I had said I told a manager that I was leaving, then that would be one thing. I wasn't leaving at the time.
Q. Is there anything about the comment that you probably would not be around much longer, that you believe would undermine your credibility in the department?
A. I probably said that I don't know at the time of my deposition as well.
Q. You did.

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A. I think it could.
Q. Also, in talking to Mr. Pearce, you made notes during that meeting, correct?
A. If you are referring to the interview with Kim Klosak and Mr. Pearce.
Q. And in those notes do you recall that you wrote down that he said, I really think what motivated Lynn Meredith-Ball and Bill Gagnon was a desire to help?
A. I would have to look at the statement.
Q. If it would help refresh your memory, at page 231 in Volume II of the deposition, that is the first one that you have?
A. I'm sorry, where?
Q. Page 231, your answer in reading from your notes is at line 13, where it says. "I really think what motivated LMB and BG was a desire to help." Do you see that?
A. If I was reading from the document at that time, it looks like it is a quote, yes.
Q. And did you take that account that Mr. Pearce was saying, I think the motivation here was their desire to help, did you take that into account in deciding whether to issue them a written reprimand to put them on a six-month probation that would prohibit them from transferring, and transfers that you knew they were trying to get. Did you take that into account?

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WILLIAM E. GAGNON, JR., Plaintiff,
vs. No. 99-0683-CV-W-1
SPRINT CORPORATION, et al. Defendant.
Thursday, January 25, 2001
Kansas City, Missouri

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE,
and a jury

VOLUME IV

APPEARANCES:

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Proceedings reported by computer stenography; transcript produced by computer.

00222

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MR. LOLLI: Plaintiffs call Julie Moylan.

JULIE MOYLAN

BEING DULY SWORN, TESTIFIED:

MR. LOLLI: May it please the Court?

THE COURT: Yes, you may inquire, Mr. Lolli.

DIRECT EXAMINATION

BY MR. LOLLI:

Q. Good morning, Ms. Moylan. Would you state your name please?

A. Julie Moylan.

Q. Where are you employed?

A. At Sprint.

Q. Have you been manager of compensation at Sprint?

A. I have been, yes.

Q. And what period of time did that cover?

A. '96 through early mid-'99.

Q. And is that the correct title, manager of compensation?

A. Yes. That was my title at that time, my job title.

Q. Who was Linda Rausch?

A. She is a woman who worked for me during my tenure as manager of compensation, and her job title was compensation analyst.

Q. And do you understand we are here today involving a claim by Mr. Bill Gagnon?

A. Yes.

Q. Do you understand that?

A. Yes, I understand that.

Q. And you will have to excuse me, I am losing my voice, I'll try to stay so everyone can hear.

When did you recall first any awareness of Mr. Gagnon and his compensation?

A. When do I recall any awareness of it?

Q. Yes.

A. Okay. My first involvement in his compensation came when a compensation exception request was submitted on his behalf.

Q. All right.

I do have one earlier question, if I may approach the witness, Your Honor?

THE COURT: Yes.

BY MR. LOLLI:

Q. I am going to hand to you what has been marked and admitted as Plaintiff's Exhibit 131, and ask if you would look at that, please?

A. Okay.

Q. Are you familiar with that document?

A. It is a copy of an e-mail communication.

Q. Are you familiar with that document?

A. Yes.

Q. And it is a communication from Linda Rausch, correct --

A. Yes.

Q. -- to Kathleen Wilder?

A. Yes.

Q. Dated September 26, 1997, is that correct?

A. That's correct.

Q. And it says subject manager multi-media, correct?

A. Yes.

Q. And if you would -- I am going to read it and see if you would agree. It says human resources has reviewed the above position summary; would that be manager of multi-media?

A. Yes, it would be.

Q. It says continues, below the recommended compensation level. And would you read that line, the next three lines?

A. Manager multi-media/CBT training MRP $66,000, STI $9,500.

Q. And then the third paragraph, starting at the short term, if you could read actually the second sentence on that paragraph?

A. We recommend hiring a candidate within 15 percent of the MRP, based on the qualifications of the candidate.

Q. And isn't it true that this e-mail was communicating a guideline for compensation?

A. Yes, it was communicating a guideline.

Q. And if I understand that guideline that was being

communicated, your department, Human Resources, was recommending multi-media/CB training position, which has MRP of $66,000, recommended that it be filled within 15 percent of that MRP; is that correct?

A. As a guideline, yes.

Q. And that would be 15 percent either below or 15 percent above; is that correct?

A. Yes.

Q. Do you understand that Bill Gagnon did fill this multi-media or manager media-media/CB training position?

A. He was subsequently promoted to the job.

Q. Okay. And he filled that position?

A. Yes.

Q. You indicated that this was a guide during the period of time that you were manager of compensation; is that a fair statement?

A. Yes.

Q. And this was a guide for compensation when Mr. Gagnon was going to fill the position of CBT training?

MR. YATES: Objection, asked and answered.

THE COURT: Sustained.

BY MR. LOLLI:

Q. You also mentioned in my first question this morning that you first became aware of the compensation issue involving Mr. Gagnon when there was a compensation request

Q. And that increase would bring Mr. Gagnon within 85 percent of the market reference point, correct?
A. Correct.
Q. The initial request was to bring his salary to full market reference point of $66,000, correct?
A. Yes.
Q. But you had recommended only to bring him up to 85 percent of that, correct?
A. Yes.
Q. Now, we talked about the exhibit before you, the letter from your department, I'm sorry, e-mail that is before you as Exhibit 131 that Human Resources recommends hiring a candidate within 15 percent of the MRP.

Now is that another way of saying that someone gets 85 percent of MRP, are those the same things, the same concepts?
A. Yes, it is.
Q. Eighty-five percent of $66,000 is the same thing as being 15 percent less than $66,000; we're just saying the same thing?
A. Yes. We are saying the same thing.
Q. Now, when you made this recommendation of Mr. Gagnon's salary of 25 percent, you thought this was reasonable, didn't you?
A. I thought it was reasonable and very generous, yes.

Q. My question is, ma'am, did you think it was reasonable?

MR. YATES: Objection, asked and answered.

THE COURT: Sustained.

BY MR. LOLLI:
Q. And you would not have recommended an increase of 25 percent if you thought someone was going to reject it; would you?
A. No, I didn't think someone would reject it.
Q. And you would not have recommended it if you thought someone was going to reject it?
A. No.
Q. And when you recommended the 25 percent increase to get within 85 percent of the market reference point, you did so consistent with the guide communicated by Linda Rausch in her e-mail, correct?
A. Yes.
Q. And by recommending that 25 percent, you were not violating any other policies of the company in doing that; were you?
A. No, I wasn't violating the policy.
Q. Were you violating any other guideline of the company when you made that recommendation?
A. No.
Q. What happened next after you made your notation on Exhibit 9, that you as head of compensation recommended 25

percent increase -- I am sorry -- 25 percent increase, to bring Mr. Gagnon to within 85 percent of MRP; what happened to the document next?
A. I would have either given it back to Lynn Meredith-Ball, because she would have had to review this with additional members of the management team to get approval, or would have sent it to her boss. I don't know exactly, you know, where it went from there, but it would have gone back to them to get additional approvals.
Q. Who was Lynn Meredith-Ball's boss at that time?
A. A gentleman by the name of Jim Mendenhall.
Q. And you do not recall where you sent that document next?
A. Not specifically, no.
Q. What do you recall next after you sent it to management?
A. I don't -- there was no communication back to me. The only thing that came back was another compensation exception request at a later time.
Q. Did you have discussions with anybody at management when you sent that form back?
A. Not that I specifically recall.
Q. Now, during this time period, did you have discussions with Ms. Wilder?
A. I didn't have any discussions with Ms. Wilder until she

returned from maternity leave.
Q. Did you have any discussions with Ms. Meredith-Ball regarding the request?
A. Not that I can recall.
Q. Was there a business justification form attached to the Exhibit 9?
A. Yes, there is.
Q. What is a business justification form?
A. This is additional information that typically the management team attaches to the form to justify any type of salary action that they want to take that is outside of normal guidelines, to explain their, or provide their rationale for their decision.
Q. And this was submitted, again, by the requester Lynn Meredith-Ball for Kathleen Wilder, correct?
A. I would assume so.
Q. That's what it says?
A. Yes.
Q. Turning, if you would, to the first page of the attachment, the compensation. Now, are those the justifications that you are talking about which support the request for the full MRP?
A. What is your question?
Q. Turning to the justification attachment, are these the reasons that support the requested salary increase to the

Mendenhall?
A. That's what I would have done, yes.
Q. Okay. And you don't know which of those two may have found it unacceptable?
MR. YATES: Objection, misstates the witness's testimony.
THE COURT: Overruled, I would let her answer.
A. No, I don't know who found it objectionable.
BY MR. LOLLI:
Q. Would you have expected Lynn Meredith-Ball to --
THE COURT: No, that's speculation. Let's go on.
MR. LOLLI: Okay, thank you.
THE COURT: We are taking too much time.
BY MR. LOLLI:
Q. Would it be a correct statement that as HR's general counsel to managers, that generally you would expect someone's salary to be around market reference point, either 15 percent below or 15 percent above?
A. Depending upon the person's qualifications in general, over time, yeah, you would expect that.
Q. And that's the general advice that HR gives to its managers?
A. In general.
Q. And that's the general advice that you as head of compensation have given to managers?

A. Yes.
Q. What happened next with the Exhibit 129 that's before you that came back from management to HR, your department?
A. This exhibit, I commented on and sent it back to them.
Q. Did you speak to anyone about it before you commented?
A. Not that I recall.
Q. Did you do any independent research or study regarding the recommendation?
A. I had knowledge of the company practices and policies in the position I held, and we see a lot of different compensation actions. So I didn't, just based on that knowledge, I didn't have to go out and do additional research.
Q. Well, my question -- maybe it was a bad question.
Did you do any independent research regarding Mr. Gagnon's qualifications?
A. No, I would have relied on any justification provided to me where they would have highlighted his qualifications.
MR. LOLLI: If I may approach, Your Honor?
THE COURT: Yes, sir.
BY MR. LOLLI:
Q. I am going to hand you now what has previously been marked as Plaintiff's Exhibit 10, ask if you could review that please?
Have you had a chance to review that document?

A. Yes.
Q. And are you familiar with that document?
A. Yes, I am.
Q. And would you describe, please, what it is?
A. It is another copy of the compensation exception request form that I just read, with the requesting the $5,000 increase, or two $5,000 increases, only this one has my comments and signature on it, and it also has Mr. Kurze's signature on it.
Q. Okay. Now, it states that there is the request for an 11 percent increase, correct?
A. Where are you reading?
Q. Right now I am reading from the management section. We are asking just over 11 percent increase.
A. Upon promotion, yes.
Q. Correct. Now, was any part of that a merit increase?
A. No, no.
Q. It was a pure 11 percent increase in salary, correct?
A. It was an 11 percent promotional increase.
Q. Okay. If any of that were merit increase -- well, let me refer to the top -- there appears to be something that says 2.34 percent, pro rata merit increase; did I read that correctly?
A. Yes, yes.
Q. Does that refresh your memory that part of this 11

percent was merit increase?
A. Okay. It does refresh my memory.
Q. With your memory refreshed, what do you now recall?
A. Well, this doesn't show the whole picture, but I am struggling a little bit. I guess what I would have understood was they were giving him a permanent merit increase, which people are entitled to when they move to different jobs, and then after they get their permanent merit, they are entitled to a promotional increase.
Q. Do you know whether the merit increase is part of the 11 percent as figured?
A. No, I really don't know.
Q. Would you agree with me that this compensation exemption request form is not even needed, if the compensation is 10 percent or less of an increase in salary?
A. That's our policy.
Q. So if the merit increase is actually part of the 11 percent, and it brings it under 10, this exemption request form wasn't even needed; would that be fair?
A. Yes.
Q. All right. Now, there is some writing in the Human Resources section, and I think you said that was your writing?
A. Yes, that's right, my writing.
Q. And your signature says signed by compensation; is that

Meredith-Ball or Mr. Gagnon?
A. After I had made this decision, at that point I was made aware of the EEOC documents. I was made aware that it happened and determined that it was two separate events.
Q. And all you reviewed at the time was Bill Gagnon's April 1998 charge of discrimination filed with the EEOC?
A. No. Yes. As I said, I did not review the documents.
Q. In September of 1998 was it your understanding you were in a position to reverse the written reminders that had been issued to Mr. Gagnon and Ms. Meredith-Ball?
A. Yes.
Q. Your decision was not to reverse the discipline?
A. Yes.
Q. Do you know if Ms. Wilder was retaliated -- if Ms. Wilder was retaliating against Bill Gagnon?
A. I am not Kathleen Wilder, so I guess, no, I don't know.
Q. Do you know if Kathleen Wilder was retaliating against Lynn Meredith-Ball while she was in the workplace?
A. The evidence on both Bill and Lynn are that she was not.
Q. But the only evidence --
A. Do I know what her intent was, no. I can't say that, I am not Kathleen.
Q. There is nothing in Exhibit 82 or Exhibit 34, the corrective action memos, there is nothing in those memos

that tells Bill Gagnon and Lynn Meredith-Ball that the corrective action was being taken because they took employees outside of the building and outside of the workplace; is there?
A. Not specifically.
Q. Something non-specific in there that tells them that?
A. Yes. That they didn't meet company standards and conduct as a Sprint PCS manager.
Q. Explain to me how that communicates to Bill or Lynn that they are being disciplined for taking employees outside of the workplace?
A. That, along with the fact that they were the company, all of this occurred outside of the workplace. Whether I am generalizing that --
Q. But the memo doesn't say that; does it?
A. Specifically the memo does not say that.
Q. Thank you. What does the memo say Bill and Lynn are being disciplined for?
A. The company has determined, based on this investigation, that you failed to meet conduct standards expected of a Sprint PCS manager. As a member of the management team you are the company to the employees.
Is it okay if I read that?
Q. What I want to know is what specific conduct are they being told justified the discipline?

A. The false perception of discrimination.
Q. Were you trying at that point to make a determination whether Bill and Lynn had created a false perception?
A. I don't recall specifically if that's what I was trying to do. I was trying to make sure they needed to stay on corrective action; that's what I was trying to do.
Q. Because they took employees outside the workplace?
A. They took employees outside the workplace. And as I said, that they had some insubordination to Ms. Wilder.
Q. Had Ms. Wilder made a determination to talk to Bill or Lynn about the incident that led to the written reminder, as opposed to issuing a written reminder, would you have supported that decision?
A. Yes.
Q. In September of 1998 when you made the decision to concur with Ms. Wilder's issuance of a written reminder, did you have any knowledge that Mr. Gagnon had earlier indicated to Ms. Wilder that he was going to seek a transfer from the department?
A. I don't recall.
Q. At the time that you made your decision to concur with Ms. Wilder in September of 1998, did you have any knowledge that Ms. Meredith-Ball had indicated to Ms. Wilder that she was going to seek a transfer from the department?
A. I don't think so, but I don't recall.

Q. How many people have you hired while you have been within the Sprint organization?
A. It has to be hundreds, I don't know.
Q. Do you know if you have ever hired an employee where it is indicated on the application a transfer, a person coming into your department already at Sprint --
A. Okay.
Q. -- where the person indicates on the application that they are subject to corrective action in their current department?
A. Have I ever hired somebody who said that?
Q. Yes.
A. I don't know if I have or not.
Q. Would that influence your hiring decision?
A. If I knew somebody was on corrective action; yes, it would influence.
Q. To the best of your knowledge, have you hired anybody in your organization or your staff who you knew was the subject of corrective action while an employee with specifically Sprint or Sprint PSC?
A. I did hire somebody once.
Q. Who was that?
A. I don't recall his name.
Q. More than one person?
A. I don't know if there was more than one person. I do

know I did hire one.
Q. Do you know what the position was?
A. Senior budget analyst.
Q. What was the nature of the corrective action, if you do recall?
A. He was on corrective action because he was running a business from his home and away from the workplace, so he was not at the workplace during his full job, doing his full job.
Q. And that did raise a concern for you?
A. I did not know when I hired him that he was on corrective action, but I did hire him when he was on corrective action.
Q. Have you hired anyone who has been, not actively, but has been on corrective action at Sprint, where you had knowledge that they had been on corrective action?
A. Yes.
Q. What was the nature of the corrective action that she had been subject to, that you were aware of?
A. She did not put an employee termination into the compensation system, so she was placed on corrective action.
Q. What is it that she did wrong?
A. She did not fill out the compensation worksheet correctly, and the policy within compensation is if you don't do it correctly, you go on corrective action.

Q. It wasn't an issue of misconduct; was it?
A. No.
Q. The written reminder to Lynn Meredith-Ball and Bill Gagnon, that is saying that they engaged in misconduct, correct?
A. The document lays out what it says, I don't know if it says misconduct.
Q. Well, you interpret that as -- well, you interpret that as misconduct?
A. Insubordination, taking people out of the work place, yes.
Q. Have you ever hired anybody who you had any knowledge that they had been on any corrective action involving misconduct?
A. Not that I am aware of.
Q. Would that influence your hiring decisions?
A. Yes.
Q. Negatively?
A. Yes.
Q. Were you ever made aware that Ms. Meredith-Ball was seeking a transfer from Ms. Wilder's department?
A. Yes.
Q. And who informed you of that?
A. Kathleen.
Q. When did she inform you of that?

A. I have no idea. I just know that we had conversations.
Q. How about Bill Gagnon, were you ever made aware that Bill Gagnon was seeking a transfer out of Ms. Wilder's department?
A. Yes.
Q. The same circumstances, while he was on corrective action?
A. Yes.
Q. How many discussions do you believe you had with Mr. Garcia concerning Mr. Gagnon and Ms. Meredith-Ball?
A. On this particular subject?
Q. On any topic specifically concerning them?
A. Ten, maybe. I mean that's an estimate.
Q. All after September of 1998?
A. Yes.
Q. Did any of those discussions involve Ms. Meredith-Ball or Mr. Gagnon seeking a transfer out of Ms. Wilder's department?
A. No.
Q. What was discussed with Mr. Garcia about Ms. Meredith-Ball and Mr. Gagnon?
A. Nine of those were discussing, bringing him, giving them 30 second updates on the case.
Q. Was that one about Bill Gagnon getting that award that they got?

A. One was about Bill Gagnon's getting that award that they got. He got an award for outstanding CBT something. I don't recall what it actually is now, but I told him about it.
Q. How many managers under your supervision had issued written reminders to employees that involved a six-month probation from transfers?
A. How many managers who work for me have put other people on written reminders, in all of managing experience, I don't know.
Q. Since you have been at Sprint PCS?
A. I don't know.
Q. Do you think there were others?
A. Oh, yeah, I know there are others. I just don't know how many. I know of one that I believe happened in 1998.
Q. What is that?
A. The manager of forecasting and reporting placed an analyst who had just started working for her on corrective action.
Q. For what?
A. The analyst claimed in her resume that she knew one of the computer programs that she was supposed to know, and she didn't, so she was placed on corrective action.
Q. For falsifying information?
A. For not being able to do her job. Part of her job was

DEPOSITION EXHIBIT
4 Gagnon
JSR 6-27-00

Bill Gagnon was hired by Sprint PCS as a curriculum developer in March of 1997. Based upon his application he received a 12% salary increase from his previous employment. He was brought in about $1,000 less than his peers based upon the lack of business experience. Most of his experience was in the military and his counterparts had extensive training within corporations.

I believe in June of 1997 we hosted a couple of Computer Based Training vendors to present their software. I encouraged the two development managers, Jim Keenan and Larry Snyder to bring their top developer to this presentation. Bill Gagnon and Ken Brantingham attended these sessions. After these sessions we decided that we needed to complete further research on these programs.

Originally we were going to have Ken Brantingham participate in research for the vendors. Due to Ken's workload, we gave the opportunity to Bill Gagnon to reseach the vendor applications.

The research consisted of participating in two weeks of training on the various applications. Bill Gagnon is the only one in the department that received this training. Bill attended 5 days of training at AMR in Dallas Tx., on World tutor Computer Based Training which we were charged $1,700, in addition to travel expense. He also attended 4-5 days training at Allen Communications in Salt Lake City, Ut. The charge for this was around $2,000, in addition to travel. Based upon these training sessions Bill made a recommendation of which software program we should purchase. I believe that Bill was also scheduled for at least one additional Multimedia seminar in 1997.

In June everyone that was part of the department attended a day of training.

Lynn and Bill became close friends. At some point before maternity leave she told me that she thought that Bill had taken a huge pay cut to take this job and that she thought that he should have been offered more in his initial job offer.

It was my intention to create a Computer Based Training Group in January of 1998. I discussed the possible opportunities with Bill and encouraged him to think about how a group should be created, staffed, etc. Bill and I had several discussions about this group.

I had discussed the Computer Based Training team with Jim Mendenhall in regards to planning for 1998. He agreed that we needed to build that team in 1998.

On August 25, 1997 I began working remotely due to my impending maternity leave. While I was working remotely my responsibilities were covered by Jim Keenan and Lynn Meredith-Ball. Somewhere between August 25 and

CLERK U. S. DISTRICT COURT
Exhibits:
P 4 D
Case No. 99-0683-CV-W-1

September 8, Lynn and Jim were going to meet with Jim Mendenhall. I told Lynn to test the water with Jim Mendenhall to see if we could possibly get a jump on 1998 by starting the Computer Based Training Team in 1997.

Jim Mendenhall approved the creation of the team. September 8, 1997 my son was born and I began my Short term Disability leave. Lynn Meredith-Ball took on the responsibility of hiring the manager for the Computer Based Training team. I am not sure if there was a Posting for the position, if anyone was interviewed or if Bill was just promoted. I know that I supported the promotion of Bill Gagnon to this management position.

Sometime while I was on Short Term Disability leave, Lynn called me at home and said that we had major problems with Biil's compensation. She said, that due to the promotion process we had a potential salary issue. I talked with Bill and explained that we might have to do an incremental process on his salary and that I would work through the process. He said he understood and appreciated the support.

I received a call from Lynn again concerning Bill's salary issue on the promotion. She said that Al Kurtze approved an increase but that he didn't approve the automatic increase in 6 months. She said that Bill would be upset by this and that he wouldn't accept the promotion. I told her that even though it wasn't automatically approved it didn't stop us from resubmitting it in 6 months.

When I returned from maternity leave it was obvious from Bill's demeanor that he was unhappy. I spoke with him and told him that I was sorry that he was not happy about this promotion. He told me that Jim Mendenhall said some negative things about him. He said that Jim Mendenhall said that we didn't need to pay him the MRP because he was a white man and could be easily replaced. I was quite horrified by the statement. I said that I had no idea that had been said. He said that Lynn had told him what Jim Mendenhall had said. A few days later Lynn said to me in front of Bill that she had told me that while I was on maternity leave and that I just didn't remember. I said that I would have remembered a statement like that. She said, you were so busy with the baby you probably don't remember, I disagreed but didn't see any value in debating it.

In December of 1997, Bill Gagnon and Lynn Meredith-Ball attended a customized session with Virginia Ostendorf in Colorado covering Interactive Distance learning another. The charge for the two of them was $5,000 plus travel and expense.

In 1997 Bill Gagnon received the opportunity to participate in 3 + seminars with a cost of $5,950 plus travel. Lynn Meredith- Ball participated in 1 seminar with a cost of $2,500 plus travel. Jim Keenan participated in 1 seminar with a cost of

$1,000 plus travel. Ken Brantingham participated in 1 seminar with a cost of $2,000 plus travel.
In January of 1998 I submitted a request to John Garcia for an increase for Bill Gagnon. The original request was for 35% increase. John directed me to meet with compensation. I met with Julie Moylan. She told me that we haven't supported a 35% increase since the beginning of our company. Her recommendation was that we would do an increase and then he would receive an increase on the common merit review and then we could do an increase of 10% in 6 months. I submitted it and it was approved. When I had a copy of the approved increase I sat down with Bill and explained the recommendation that Julie walked me through. I showed him a set of stickies that had each step that I would be willing to recommend based upon his performance. He asked to make a copy of it and I let him.

In February Bill Gagnon and Lynn Meredith-Ball attended a Seminar in Orlando Florida.

In March I processed every exempt employee for the transition to the common merit review. Each manager received the same increase.

In April Bill Gagnon and Lynn Meredith- Ball attended two seminars.

Dale Coffman is scheduled to attend a seminar in May and one in June.

At this point., Heather Rogers and Jim Keenan have not attended nor are they presently scheduled for a training seminar.

It is my intention to process an exception report for Bill in June to be effective 6 months from his previous salary change based upon his current performance.

Meredith-Ball, Lynn

From: Glover, Barbara
Sent: Wednesday, October 15, 1997 11:33 AM
To: Keenan, Jim; Meredith-Ball, Lynn
Cc: Mendenhall, Jim; Francis, AJ
Subject: Training Interviews

I provided my notes regarding the two candidates I interviewed yesterday in a previous e-mail.

The following is a list of things to think about:

- Both candidates are career military.
- Both have worked or currently work for the same company, Logicon, so have very similar backgrounds as far as type of expenence since leaving the military. I believe that Bill Gagnon has also worked for the same organization. That would make three people with the same basic background in the training organization.
- Diversity is critical for an organization to grow and thrive.
- Different skill sets, different backgrounds and experiences are essential in a well-rounded training organization.
- The organization should reflect the environment in which it is providing training.

Hope this helps!

Thanks!

CLERK U. S. DISTRICT COURT
Exhibits:
P 16 D
Case No. 99-0683-CV-W-1

Memorandum

To: Bill Gagnon

From: Kathleen Wilder

CC: Kimberly Klosak

Date: August 27, 1998

Re: Written Reminder

CLERK U S DISTRICT COURT
Exhibits:
P 34 D
Case No 99-0683-CV-W-1

DEPOSITION EXHIBIT
34 Gagnon
JB 6-29-00

Bill,

It was brought to my attention and confirmed through an investigation that you created the perception among some team members that I am uncomfortable with the number of former military personnel we have hired. You also stated advancement opportunities did not exist within our department.

The Company has determined based on this investigation that you failed to meet conduct standards expected of a Sprint PCS Manager. As a member of the management team, you are the "Company" to employees. And as a manager, Employees listen more closely to what you say. You have created a false perception that discrimination is occurring in the workplace. Not only do your actions put the company at risk for something that is absolutely not true, but it also undermines my authority, as well as your team managers' authority. As a manager, an essential function of your job involves teamwork and treating all employees with respect. Your actions outlined above do not foster the work environment that we are striving to create. If you have an issue with my actions as a Director, you should discuss the issue with me first or address it with HR. If it is not resolved to your satisfaction, you always have the option of discussing it with Sherri Gilligan or even John Garcia. This is the purpose of the Open Door Policy and the Complaint Resolution Policy. It is wholly inappropriate to discuss these issues/false implications with staff members. Negative implications regarding the management team should be discussed within the management team, not among staff members. Once again, if you have an issue with a member of the team, either management or staff, you should discuss it with the appropriate management personnel.

To reiterate, it is imperative that you immediately improve your professionalism, personal effectiveness and team conduct.

Also, retaliation against individuals participating in this investigation will not be tolerated and is a serious violation of our Standards of Conduct. Employee always have the right to bring issues/concerns to the management team or directly to HR. Failure to achieve and sustain expected performance will result in further corrective action, up to and including termination.

Per SPCS policy, corrective action is determined on a case by case basis. Based on the investigation conducted and your improper conduct, the Company has concluded that the circumstances necessitate that you be placed on a Written Reminder. This Written Reminder will be placed in your personnel file and is

CONFIDENTIAL

active for six (6) months. During this time, a transfer or promotion cannot take place without prior approval of our Vice President.

Bill, I am confident you will successfully correct the problems addressed in this letter.

I have read and understood this Written Reminder..

Bill Gagnon Date

Kathleen Wilder 8/27/98

Kathleen Wilder, Director Date

Gagnon, William

From: Wilder, Kathleen
Sent: Wednesday, October 07, 1998 5:05 PM
To: Gagnon, William
Subject: RE: Candidate Interest Form

Bill,

You have been on corrective action for less than 6 weeks, this was in reference to a trait that would transfer from job to job rather than a particular skill set. Therefore, I will not support an exception to company policy at this point in time.

Kath

From: Gagnon, William
Sent: Wednesday, October 07, 1998 1:18 PM
To: Wilder, Kathleen
Subject: Candidate Interest Form

Kath, on August 11th I sent you an e-mail letting you know that I was interested in some new positions that Mike King may have opening up.

Mike has invited me to apply for one of the manager positions recently approved. Here is the Candidate Interest Form and my resume. I hope that you will support me in this process and forward my paperwork to John with a favorable recommendation that he sign this form.
<<File: Mgr, Contract Compliance CIF.doc>><<File: Bill Gagnon, Resume.doc>>

Thanks

Bill Gagnon

Manager,
Multimedia Based Training
Systems Release and Upgrade Training

Office: 816-559-2414
PCS Phone: 913-226-0220
FAX: 816-559-1291

CLERK U. S. DISTRICT COURT
Exhibits:
P 50 D
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Sprint

Ellen S. Martin
General Attorney
Direct Line (816) 559 2519

Sprint PCS
Business Law Group
4900 Main, 12th Floor
Kansas City, Missouri 64112

CLERK U S DISTRICT COURT
Exhibits
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Case No 99-0683-CV-W-1

VIA FEDERAL EXPRESS

Ms. Ann Kenney Molloy
U.S. Equal Employment Opportunity Commission
Kansas City Area Office
400 State Ave., Ste. 905
Kansas City, KS 66101

Re: William Gagnon v. Sprint PCS
HRC Charge No. 281 98 0705

Dear Ms. Kenney-Molloy:

Sprint PCS ("Employer") or ("SPCS") is by this Position Statement responding to the charge of race and gender discrimination filed by William Gagnon ("Gagnon"). Because additional facts may become known during the investigation of this matter, SPCS respectfully reserves the right to amend this Position Statement in the future and to assert additional defenses.

I. REQUEST FOR INFORMATION

Request No. 1: Please identify by full name, complete business address, including zip code, and complete telephone number, including area code, of the person who is the custodian of the records identified in this request for information. The custodian of the records is normally that person who bears overall responsibility for the preparation, maintenance, retention, and destruction of such records.

Response: Ellen Martin
General Attorney-Employment Law
4900 Main Street, 12th Floor

DEPOSITION EXHIBIT
25 Widder
FB 7-25-00

Kansas City, MO 66112
(816) 559-2519

Response to Mediation request?

Abbie Dillard
Manager-EEO
4900 Main Street, 7th Floor
Kansas City, MO 66112
(816) 559-7529

Request No. 2: Documents which reflect policies and procedures on promotions, Market Reference Point, and salary adjustment that were in effect during the period indicated above. To the extent that pre-existing documents do not fully explain the procedure, submit a written explanation of the procedures.

Response: Exhibit 1 & Position Statement

Request No. 3: Provide all documents showing:

a) employment history of Charging Party including but not limited to date of hire, all positions held, date of tenure in each position, and reasons for changes in positions

Response: Mr. Gagnon was hired by Sprint PCS on March 3, 1997 in the position of Specialist-Curriculum. He remained in that capacity until October 10, 1997, when he was promoted to the Manager Multimedia/Computer Base Training. He remains in that position today. Exhibits 2 and 3.

b) any performance evaluations, comments, or critiques

Response: Exhibit 4.

c) complete salary history

Response:

Date	Rate	Job Title
03/11/97	21.121	Specialist-Curriculum
10/10/97	23.995	Manager-Multimedia/ CBT Training
1/22/98	27.594	Manager-Multimedia/ CBT Training
04/05/98	28.130	Manager-Multimedia/ CBT Training

Exhibit 5.

d) all documents related to the calculation of Charging Party's salary, including all proposals (whether accepted or rejected), and the rationale behind any final decision

Response: Exhibit 7,8,9,and 10 & Position Statement.

e) name, job title and role of any individual responsible for such decisions

Response: Al Kurtze, Chief Operating Officer; John Garcia, Senior Vice President of Sales & Marketing; Julie Moylan, Compensation Manager, HR; Jim Mendenhall, Vice President Staff Operations; Kathleen Wilder, Director Sales-Ops, Gagnon's direct supervisor; Lynn Meredith-Ball, co-worker of Gagnon, acting as hiring manager when Wilder was out on leave.

Request No. 4: Provide documents showing the job description and duties for any position Charging Party's has held. Indicate when the description was prepared and by whom.

Response: Exhibit 11.

The position descriptions were initially prepared by Gagnon and Lynn Meredith Ball, Gagnon's peer and co-worker, and approved by Kathleen Wilder, Director-Sales Operations.

Request No. 5: Provide information on and/or any documents pertaining to the following for any management employees within Charging Party's department who were employed at any time during the time frame indicated on page one of this request:

a) full name

Response:

1. Jim Keenan
2. Lynn Meredith-Ball
3. Heather Rogers,
4. Dale Coffman,

b) job title

Response:

1. Regional Training Manager
2. Manager-Editing & Production Operation
3. Manager-Training Certification
4. Regional Training Manager

c) length of time in this position

Response:

	Hire Date	Time Began in Position
1.	11/5/96	11/5/96
2.	8/26/97	8/26/97
3.	8/12/97	8/12/97
4.	2/6/98	2/6/98

d) MRP for position at time this individual assumed position

Response:

Name		MRP at time of Hire
1.	Keenan, Jim	$57,000
2.	Meredith-Ball, Lynn	$57,000
3.	Rogers, Heather	$60,000
4.	Coffman, Dale	$58,000

e) individual's salary at the time he or she assumed the position

Response:

Name	Salary	STI
Jim Keenan	$60,000	$5,000
Lynn Meredith-Ball	$65,500	$5,000
Heather Rogers	$54,532	$5,000
Dale Coffman	$57,429	$5,000

f) current MRP for position

Response:

	Job Title	MRP
1.	Regional Training Manager	$58,000
2.	Manager Editing & Production Ops.	$58,000
3.	Manager Training Certification	$62,000

g) individual's current salary

Response:

Name	Current Salary
Jim Keenan	$63,435
Lynn Meredith-Ball	$67,152
Heather Rogers	$55,866
Dale Coffman	$57,430

h) whether employment has ended and if so the date employment ended and reason (i.e. resignation, discharge, etc.)

Response: All of the employees referenced above are still employed by Sprint PCS. Also see Exhibit 12, 13, 14, 15, and 16, information related to each of Gagnon's co-workers, including resumes and applications.

POSITION STATEMENT

II. INTRODUCTION

In his charge, Gagnon alleges that SPCS's failure to give him a more than 33% salary increase over a 7 month period resulted because he is a white male. Documentary evidence supports that Gagnon's salary increase procedure followed company policy; he was not treated differently from others in his group nor from others in the company. Additionally, Gagnon has failed to present direct or indirect evidence to establish that Sprint PCS discriminated against him on the basis of gender, race or any other unlawful basis.

III. BACKGROUND

Sprint PCS is a national wireless telecommunications Company with headquarters in Kansas City, Missouri. The company has a training department that is responsible for training the field operations staff. The training involves a number of areas included but not limited to orientation, product features, and sales techniques. Gagnon, a white male, began employment with SPCS on March 11, 1997, as a Curriculum Specialist. Gagnon's salary before joining SPCS was $42,000. Sprint PCS hired him with a base salary of $44,100 (and he was also eligible to receive a short-term incentive compensation amount of $3000, depending upon Company and personal performance). He reported to Jim Keenan, Training Manager-Systems and Technology. Last Fall, the training department designed a computer-based training (CBT) position. Seven months after starting with Sprint PCS, Gagnon was promoted to Manager of CBT. At that time he received an initial salary increase to $50,100. He currently is paid a base salary of $58,735. Exhibit 5.

Company Salary Guidelines

An explanation of the Company's pay practices is necessary to demonstrate the falsity of Gagnon's disparate pay claims. Gagnon's complaint relates to his base pay. At Sprint PCS, base pay is determined based upon 1) the supervisor's assessment of an individual's performance; 2) the relationship between an individual's base pay and the "market reference point" (MRP)[1] of the job; and 3) the department's budget for salary increases. Each job is assigned an MRP, which is basically a control point within the broad band base salary structure. MRP is derived from external salary surveys as well as from internal job surveys. The MRP provides salary guidance within a broad band structure. Exhibit 1.

[1] As a start-up venture Sprint PCS hired over 8000 employees in less than 3 years. Given the start-up nature of the company, Sprint PCS designed the compensation guidelines, including the MRP broad band concept to allow management flexibility in hiring individuals for a position despite varying degrees of experience.

The relationship of an employee's salary to the MRP for that position is calculated by dividing an employee' base salary by the MRP for the position. The percentage is then used to show where an employee's salary is in relation to the MRP. No employee is entitled nor guaranteed to be paid the MRP; rather, salary recommendations in relation to MRP are based upon factors including business needs, market demand for a position, financial/ budgetary constraints and qualifications and experience levels of the employee. Gagnon's promotion to the manager position resulted in a nearly $20,000 increase in MRP. The Company's decision to offer him a salary at the lower end of the MRP range was based on his experience and qualifications, not on discriminatory reasons.

Sprint PCS Salary Guidelines Applied To Gagnon

An analysis of these Sprint PCS' primary salary guidelines as applied to Gagnon refutes his claim of discrimination.

(1) Manager Assessment of Individual Performance

Gagnon's performance was acceptable in that he met or exceeded his supervisor's expectations and the objectives established for his position. While Gagnon is a valued employee, he did not have all of the necessary technical expertise for the management position to which he was promoted until the Company paid for his training. Nor did Gagnon have the same level of relevant or industry-related experience. As demonstrated by Gagnon's resume, the majority of his experience before Sprint PCS was in the military; his counterparts had extensive training experience within corporations. Exhibits 2 and 11, Gagnon's Resume and Job Description. The Company recognized that Gagnon had the potential to develop in this position and therefore, promoted him and then encouraged him to attend multiple training courses in CBT management to develop his skill set.

(2) Relationship of Salary to MRP of Position

The crux of Gagnon's claim is his pay in relation to the MRP for the position. Gagnon's salary history is as follows: Gagnon began employment with the Company in early March of 1997, at a base pay of $44,100 (or a rate of $21.12 /hour). Seven months later (10/97), he received an increase to $ 50,100 ($23.99/ hour); 3 months after that he received yet another increase to $ 57,615 ($27.59/ hour); and in April, 1998, Gagnon's salary increased to $58,735 (or $28.13/hour). In the nearly one year that Gagnon has been employed by Sprint PCS he has received salary increases totaling $ 14,635 or a 33.19% increase in base pay.[2] Exhibit 5.

[2] Two additional compensation issues related to Gagnon are worth noting: 1) Gagnon received a considerable increase above his former salary; this percentage increase is not reflected in the 33% increases in salary Gagnon has received after his starting date of March, 1997; and 2) this calculation does not include an increase in his short-term

The sequence of events relating to approval of Gagnon's salary in connection with his promotion is as follows: First, HR approved a position for Manager CBT and recommended a compensation level of $66,000 with a $9500 short term bonus. On or about October 1, 1997, Gagnon's peer and co-worker, Lynn Meredith-Ball, acting hiring manager while Kathleen Wilder was out on leave, recommended a 35% increase in his base salary. At that time, Julie Moylan, HR Compensation Manager disagreed and recommended a 25% increase, "to bring him within 85% of MRP." Jim Mendenall, VP of Staff Operations, to whom Wilder reported directly, did not approve the 35% or the 25% increase recommendations. On October 8, 1997, Meredith-Ball revised the recommendation and an 11% increase was agreed to by Moylan and Mendenhall, and ultimately approved by the Chief Operating Officer, Al Kurtze (white male). Meredith-Ball also recommended at that time for salary increases in the next 6 months. Moylan of HR, however, would not approve an automatic future salary increase: "strongly disagree with approving future salary action." Kurtze agreed not to approve the guaranteed future increase. Exhibits 8, 9, and 10.

In January of 1998, Gagnon's direct supervisor, Wilder, had returned from leave and offered another recommendation for an increase to 85% of MRP. Moylan of HR concurred and John Garcia, Senior Vice President Sales-Distribution approved the increase. In March, Gagnon received a 4%merit increase (pro-rated) resulting in a 2% increase in base salary. This was also approved by appropriate supervisors. Exhibits 17.

This salary management process was explained to Gagnon in January of 1998 by Wilder. Gagnon was also advised that if business considerations allowed and if performance expectations were met, another increase would be requested within 6 months or July, 1998. Gagnon's supervisor will address if another increase is warranted and if so, proceed through the Company process and obtain HR and senior management approval.

> As is demonstrated in the exhibits, company procedure was followed; legitimate business justifications were presented to support the salary increases in October and January. Additionally, multiple decision makers were involved at each level and for each request. Accordingly, Gagnon's claim that the decision was driven by his race or gender is simply unfounded.

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incentive compensation target amount, which increased from $3000 in April, 1997 to $9,500 in April, 1998. Payout of short-term incentive bonuses is based on company and personal performance. In the past 2 years the Company has paid at least 80% of this bonus to employees who meet performance objectives.

IV. GAGNON'S CHARGE OF DISCRIMINATION MUST BE DISMISSED BECAUSE HE HAS FAILED TO MEET THE PRIMA FACIE TEST FOR RACE AND GENDER DISCIMINATION

A. Gagnon Has Not Stated A Claim for Race or Gender Discrimination.

Gagnon is claiming if he were not a white male, he would have received a 35% increase the Company. Because Gagnon is a white male, he belongs to a historically favored group. Generally, part of a plaintiff's burden for a prima facie case is to establish (1) he belongs to a protected class and (2) he suffered adverse employment action because of his race or gender. Here, the typical prima facie case is adjusted for the specific context of reverse discrimination. Instead of showing membership in a protected class, Gagnon must establish (1) background circumstances that support an inference that Sprint PCS is "an unusual employer that discriminates against the majority," or (2) direct evidence that an adverse employment decision was based on his race and gender. Gagnon cannot meet his ultimate burden of persuasion on these issues.

1. Gagnon cannot establish that Sprint PCS is not an "unusual employer who discriminates against the majority."

Gagnon fails to sustain his charge of race and gender discrimination because he cannot establish that Sprint PCS discriminates against the majority. Gagnon has not and cannot present any evidence of background circumstances to support that Sprint PCS discriminates against white males generally. Of note, the supervisor who allegedly made the remark (although Sprint PCS contests he was responsible for the ultimate salary decision) was a white male. And the Chief Officer who approved his initial promotional increase was also a white male. Additionally, Gagnon himself asserts that other white males in his group are at 100% of MRP. (Which is not entirely accurate, although one white male is currently above MRP and the other white male is at 99% of MRP). Gagnon's own assertions discredit any argument that Sprint PCS has a history of discriminating against white males.

2. An isolated remark by a white, male employee who did not ultimately make the decision on Gagnon's raise is not sufficient direct evidence to establish that Gagnon would have received an additional pay increase if he were not a white male.

Gagnon has not presented sufficient direct evidence to establish that he suffered any adverse action based on his race or gender. Gagnon's entire claim is based on one alleged discriminatory remark – that if Gagnon were not a white male he would have received a greater increase. Moreover, Gagnon admits this remark

was not made directly to him. This bare allegation is not sufficient to establish direct evidence of discrimination on any basis.

The alleged remark was made by a white male. Additionally, the Company has established above, including documentation, that even if this remark were made, the accused individual was not the ultimate decision maker and that company processes were followed. Contrary to Gagnon's allegations no one individual was entirely responsible for the decision on his pay increase. Company policy requires that "[a]ll salary increases require at least two levels of management and an HRR signature." Further, for promotions entailing more than a 10% increase in pay (as in Gagnon's case) required the approval by a Chief Officer. And to add to these stringent requirements, Company policy notes "red flags," which when raised require a second review by the Company's compensation specialists. Exhibit 1. These policies were followed.

Necessarily by following company procedure, multiple individuals were involved in the decision on Gagnon's promotional pay. His salary increases decisions involved input from HR Compensation Manager, his direct supervisor, her direct supervisor (the person who made the alleged comment), and ultimately his boss, a white male and Chief Officer of the Company. Exhibits 1, 8, 9, and 10.

Even if the employee made such a remark (which Sprint PCS cannot confirm because the individual no longer works for the Company), a random, one-time comment made by a white male who was not the ultimate decision maker on the pay increase issue is not sufficient to establish a claim of discrimination. While Mendenhall may have been one of the individuals consulted in the salary increase process, ultimately two Chief Officers had the final approval in consultation with Sprint PCS' benefits department. Exhibit 8, 9 and 10. Thus Gagnon cannot demonstrate a nexus between any such discriminatory remark and the challenged personnel decision. Assuming arguendo the remark was made by Mendenhall, one stray, isolated remark does not establish the necessary discriminatory animus. Mendenhall's alleged discriminatory animus cannot be linked to Sprint PCS' legitimate business decision on Gagnon's salary increase. Gagnon clearly cannot establish that but for his being a white male, he would have received a greater percentage increase in pay.

(3) The Company's decision to pay Gagnon less than 100% of MRP is not unlawful, regardless of what other managers are paid in his group.

In his charge, Gagnon asserts that he is being discriminated against because he is "not aware of any other manager in [his] department receiving less than 100% of MRP." As outlined above, pursuant to Company policy, individual circumstances must be considered in determining an employee's salary. Exhibit 1. It is not discriminatory for a company to pay employees performing the same job different

salaries so long as the differences in pay are not attributable to discriminatory motives. This is simply the exercise of sound business discretion.

Gagnon is incorrect in stating that all other managers in his work group are receiving 100% of MRP. Exhibits 13-16 and Responses To Inquiries. But even is he were correct, that the Company has made a decision based upon his experience level and qualifications for his new role as a manager that he would receive a considerable increase in pay, but an amount less than the MRP for that position, is not unlawful. Certainly many employees throughout the entire Company are paid less than 100% of MRP based on factors such as limited experience or lesser qualifications than the ideal candidate may have. As a start-up company, Sprint PCS has provided many opportunities for less experienced employees to grow into roles. To state that other managers (including 2 of the 5 white male managers) within the training group are paid more than Gagnon is not sufficient to support a claim of race and gender discrimination.

V. CONCLUSION

In sum, the facts cited above along with the attached supporting documentation clearly demonstrate that the Company fairly applied its salary guidelines to Gagnon, without regard to his race, gender or any other unlawful consideration. The determination of Gagnon's salary increase was based entirely on Company policy and legitimate business considerations. Accordingly, SPCS respectfully requests that Gagnon's charge for race and gender discrimination be dismissed as without merit.

Respectfully submitted,

Ellen E. Martin

Ellen S. Martin
General Attorney

Meredith-Ball, Lynn

From: Rausch, Linda
Sent: Friday, September 26, 1997 3:42 PM
To: Wilder, Kathleen
Cc: Meredith-Ball, Lynn; Mendenhall, Jim; Eisler, Gina
Subject: Mgr Multimedia

Human Resources has reviewed the above position summary. Below is the recommended compensation level.

Mgr Multimedia/CBT Training
MRP: 66,000
STI: 9,500

The short-term incentive is an annual amount that is pro-rated based on the job start date. We recommend hiring a candidate within 15% of the MRP based on the qualifications of the candidate.

Your recruiter, Gina Eisler, has been copied on this message. She will be able to assist you in the hiring process.

Linda T. Rausch
Compensation Specialist
Human Resources
816-559-7507
Fax 816-559-7590

CLERK U. S. DISTRICT COURT
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DEPOSITION EXHIBIT
131 Meglan
JSB 8-23-00

COMPARATIVE SKILL SETS
(BILL GAGNON)

MILITARY

Computer Systems Technology

Computer Based Training

Computer Training Development

Group Training Development

Individual Training Development

Project Management

Personal Computer Skills

Communications Skills (verbal and written)

Time Management (personal, team and projects)

People Skills and Team Building

Personnel Management

Problem Solving Skills (technical and non-technical)

Budget Control and Planning

Strategic Planning

Computer Simulation Training

Instructor-led Training

Interactive Distance Training

Pilot and Flight Instructor

Security/Intelligence

Leadership

Organization Designing

Logistics

Negotiations

Administrative-Record Management

International Relations

Investigations

Mediation

Counseling

SPRINT

Computer Systems Technology

Computer Based Training

Computer Training Development

Group Training Development

Individual Training Development

Project Management

Personal Computer Skills

Communication Skills (verbal and written)

Time Management (personal, team and projects)

People Skills and Team Building

Personnel Management

Personal Solving Skills (technical and non-technical)

00803

CLERK U S DISTRICT COURT
Exhibits
P 267 D
Case No 99-0683-CV-W-1

POSITIONS BILL GAGNON APPLIED FOR

Date of Application	Position	Salary of Position	Job Grade (Position Level)	Person Hired
10/7/98	Manager, Contract Compliance	$48,001	75	Patrick H. Allen (White)
1/1/99	Manager Program Management U/C - Sr OD Consultant	Cancelled		
1/18/99	Director, Merchandisers SWAT			
3/9/99	Resume to B. Blessing			
3/9/99	Manager IT Client Services	Never Filled		
3/24/99	Manager, Strategic Initiatives	$74,376	79	Ronald Clond (White)
4/7/99	Program Manager	$57,000?	75	Joy Gish (White)
4/7/99	Manager, IT Planning	$79,001	78	Navid Nikravan (White)
4/20/99	Senior Product Manager	$68,217	78	Sharon L. Simmons (Black)
4/23/99	Lead Negotiator	$90,940	79	Howard Eugene Coleman (White)
4/30/99	Manager, Strategic Initiatives	$91,387	79	Bonnie Hoopes (White)
5/5/99	Senior Manager Business Development Tower Group	$75,000	78	Curtis Robinson (Black)
6/21/99	Sr. Implementation Manager			

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Case No 99-0683-CV-W-1

Date of Application	Position	Salary of Position	Job Grade (Position Level)	Person Hired
6/23/99	Program Manager of Project Management	$74,911	78	Rex Suman
10/7/99	Business Planning Manager/Strategic Planning		77	Kimberly York (White)
10/7/99	Manager Strategic Planning II		78	Susan Collins
1/7/00	Product Manager III	$68,095	78	Chad Means (White)
1/28/00	Manager Fraud Operations	$78,001	78	Adrieanna Lewis (White)
1/28/00	Manager, Fraud Operations	$66,400	78	Frank Gardi
2/18/00	Manager Affiliations	$78,124	79	Robert Tarne (White)

COMPENSATION SUMMARY
MANAGERS SPRINT PCS - TAPS
KANSAS CITY 1997

Date	Annual Salary Rate	MRP	Job Grade	% of MRP
GAGNON				
10/10/97	*$50,101.56*	*$66,000*	*660*	*76%*
1/22/98	$57,616.27	$68,000	68A	84%
4/4/98	*$58,735.44*	*$68,000*	*68A*	*86%*
KEENAN				
12/6/96	$60,000.77	$57,000	570	105%
11/5/97	*$62,401.97*	*$57,000*	*570*	*109%*
4/4/98	$63,435.53	$57,000	570	111%
MEREDITH-BALL				
8/27/97	$65,500.56	$57,000	570	115%
4/4/98	*$67,152.17*	*$58,000 (12/98)*	*580*	*116%*
SNYDER				
11/14/96	$60,000.77	$57,000	570	105%
9/27/97	*$60,000.77*	*$57,000*	*570*	*105%*

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Exhibits:
P 270 D
Case No. 99-0683-CV-W-1

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WILLIAM E. GAGNON, JR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 99-0683-CV-W-5
	)	
SPRINT CORPORATION d/b/a SPRINT, SPRINT SPECTRUM L.P. and SPRINT SPECTRUM FINANCE CORPORATION d/b/a SPRINT PCS,	)	
	)	
Defendants.	)	

DEFENDANTS' NOTICE OF CORPORATE AFFILIATIONS

COME NOW the Defendants, pursuant to the Court's Order of September 27, 1999, and provide the attached statement identifying all of their parent companies, subsidiaries and affiliates.

Respectfully submitted,

BRYAN CAVE LLP

By: _____

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Robert J. Hoffman MO Bar #44486
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1200 Main Street, Suite 3500
Kansas City, Missouri 64105
Telephone: (816) 374-3200
Facsimile: (816) 374-3300

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, on this 12th day of October, 1999, to:

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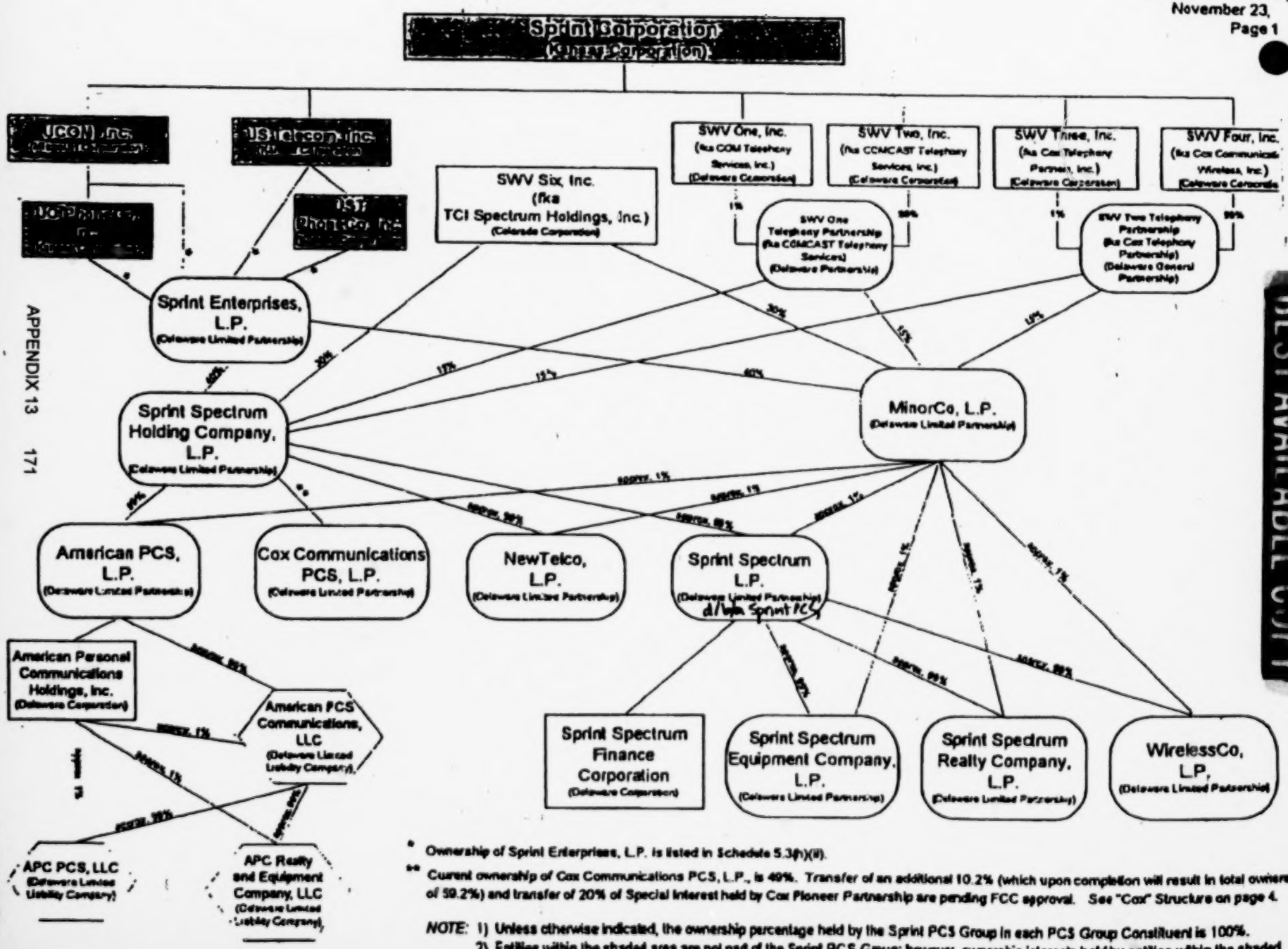
KITCHIN & McLARNEY, LLC
922 Walnut Street, Suite 1500
Kansas City, MO 64106-1848
ATTORNEY FOR PLAINTIFF

Attorney for Defendant

PCS Group Constituents



* Ownership of Sprint Enterprises, L.P. is listed in Schedule 5.3(h)(ii).

** Current ownership of Cox Communications PCS, L.P., is 49%. Transfer of an additional 10.2% (which upon completion will result in total ownership of 59.2%) and transfer of 20% of Special Interest held by Cox Pioneer Partnership are pending FCC approval. See "Cox" Structure on page 4.

NOTE: 1) Unless otherwise indicated, the ownership percentage held by the Sprint PCS Group in each PCS Group Constituent is 100%.
2) Entities within the shaded area are not part of the Sprint PCS Group; however, ownership interests held by entities within the shaded

APPENDIX 13 171

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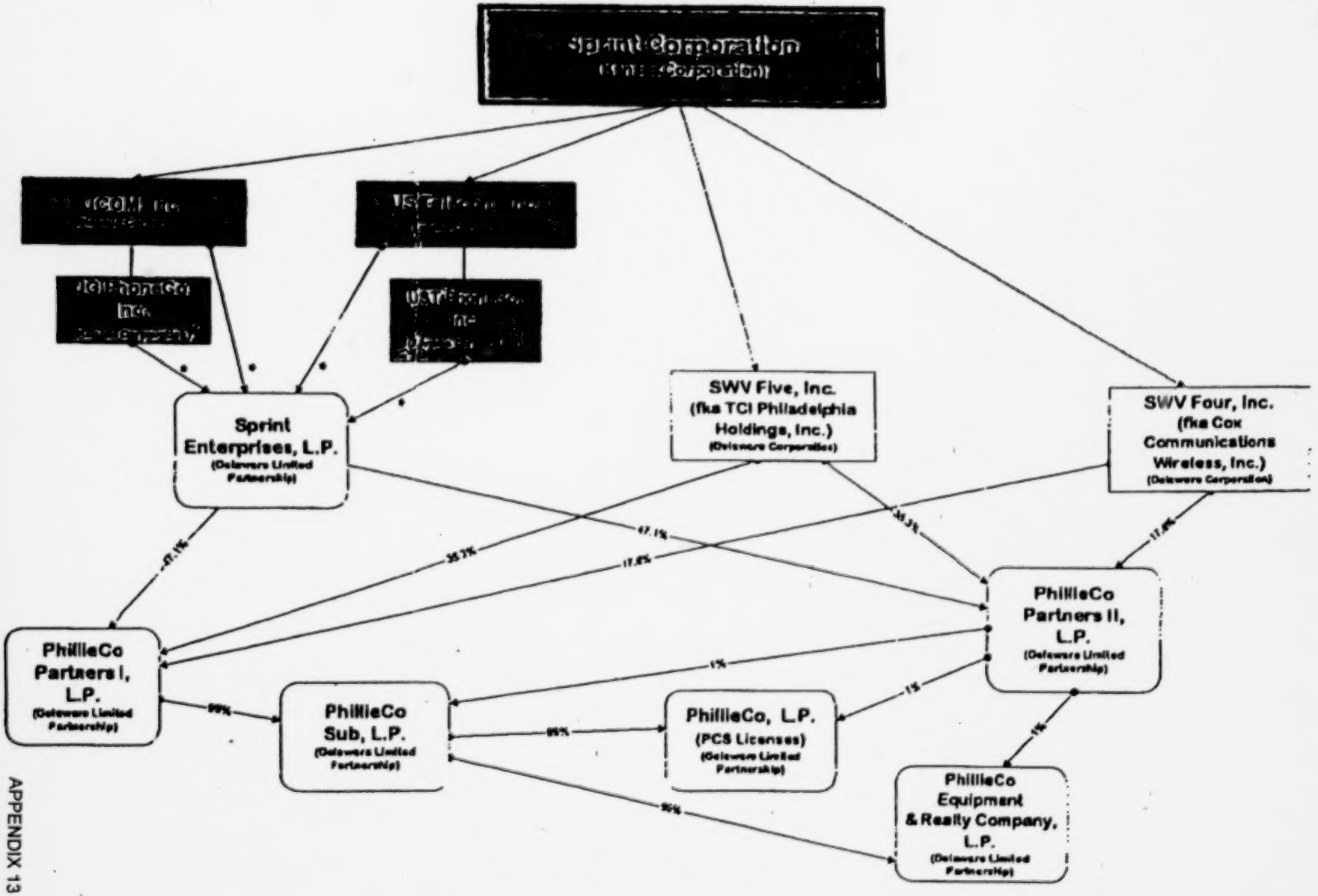

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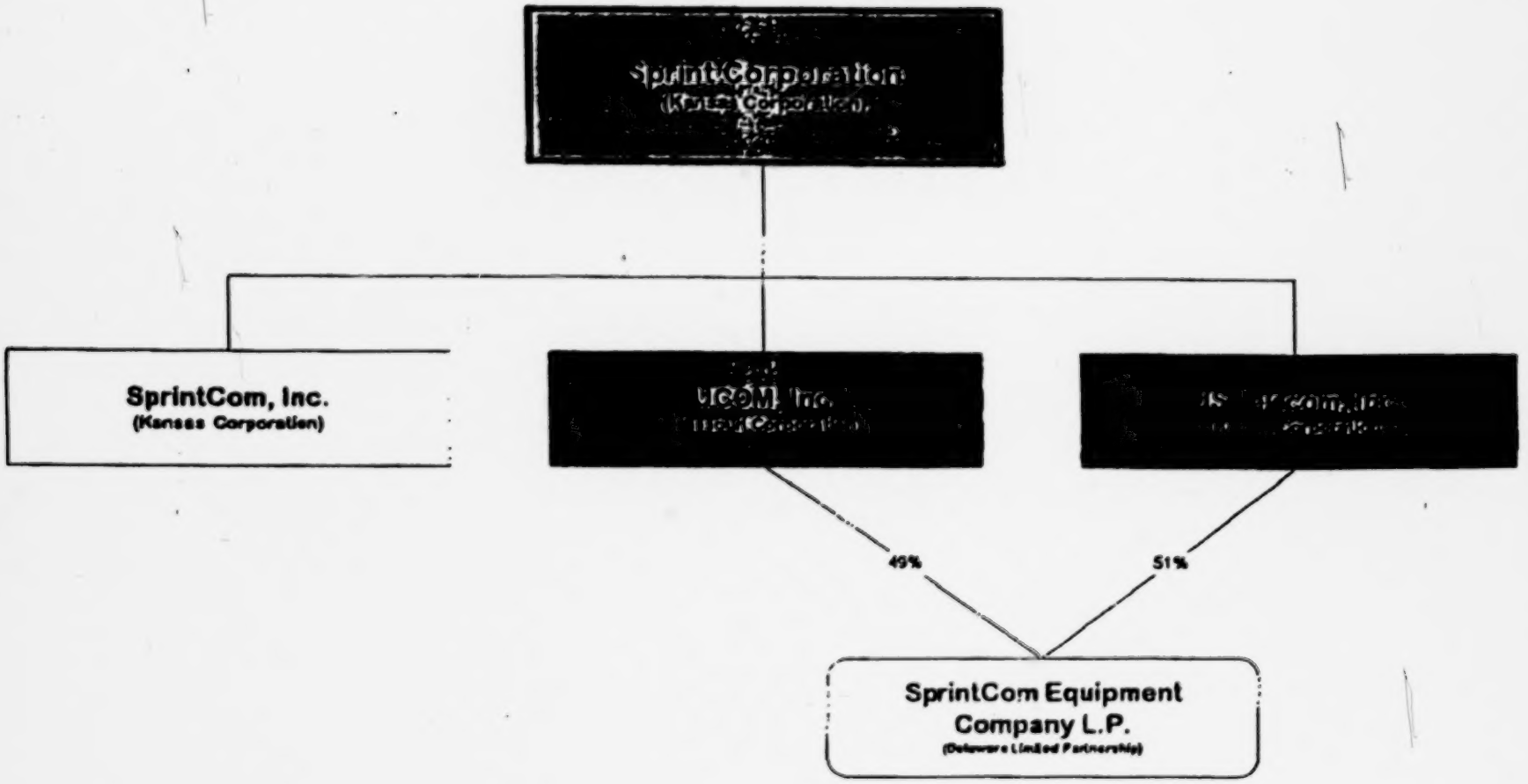
PCS Group Constituents
"SprintCom" Structure



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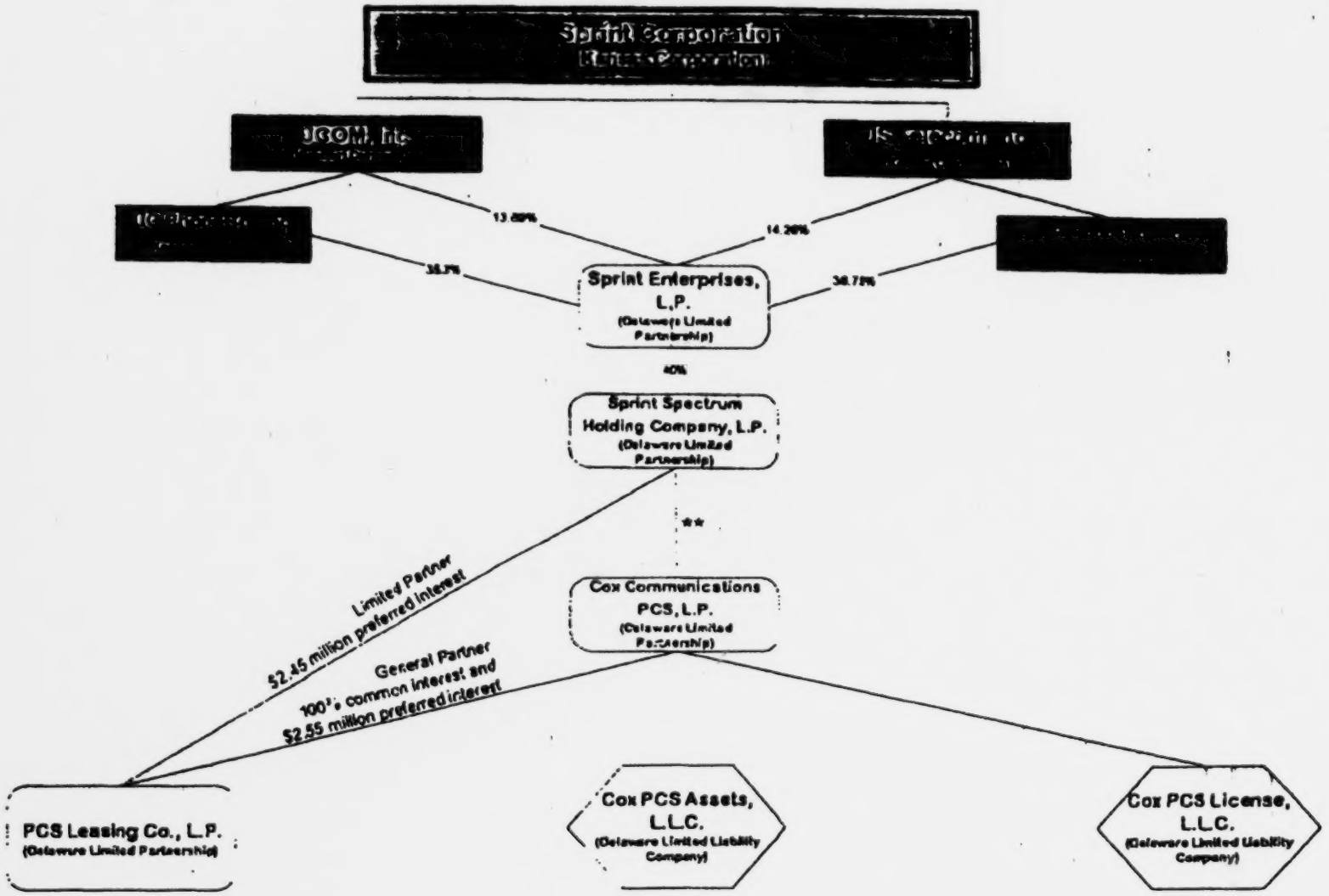
2) Entities within the shaded area are not part of the Sprint PCS Group; however, ownership interests held by entities within the shaded area in entities within non-shaded areas are attributed to the PCS Group.

PCS Group Constituents
"Cox" Structure



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Supreme Court, U.S.
FILED
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(3)

No. 02-295

In the Supreme Court of the United States

WILLIAM E. GAGNON,

Petitioners,

v.

SPRINT CORPORATION, DBA SPRINT SPECTRUM L.P.;
SPRINT SPECTRUM FINANCE CORPORATION, DBA SPRINT PCS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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31 pp

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INTRODUCTION

Respondents Sprint Corporation, d/b/a Sprint Spectrum L.P. and Sprint Spectrum Finance Corporation, d/b/a Sprint PCS (collectively, "Sprint") request that the Court deny William Gagnon's Petition for Writ of Certiorari ("Petition"). Not only has Gagnon wholly misstated the record, the issues he requests this Court to review present no discord among the circuits, and do not warrant the rare invocation of the Court's judicial review power.

COUNTER-STATEMENT OF THE CASE

William Gagnon sued Sprint on July 20, 1999 in the United States District Court for the Western District of Missouri. Gagnon alleged the following claims: (1) reverse race and gender discrimination under Title VII, 42 U.S.C. § 2000 *et seq.*, and the Missouri Human Rights Act ("MHRA"); (2) retaliation under Title VII and the MHRA; and (3) discrimination and retaliation under the Uniform Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301 *et seq.* Gagnon and Sprint filed cross motions for summary judgment on Gagnon's USERRA claims. On January 4, 2001, the district court granted Sprint's motion for summary judgment. Petitioner's Appendix ("Pet. App.") 25-47. Gagnon's remaining Title VII and MHRA claims proceeded to trial on January 22, 2001. After the completion of Gagnon's case-in-chief, the district court entered judgment as a matter of law against Gagnon on his remaining claims.[1]

[1] The Eighth Circuit reversed the district court's ruling on Gagnon's Title VII / MHRA discrimination claim, holding that Gagnon presented "direct evidence" of discrimination triggering the *Price Waterhouse* / "mixed motives" analysis. This ruling by the Eighth Circuit exemplifies the mass confusion in the circuits as to

Among other issues, Gagnon appealed the district court's ruling on his USERRA claims. The Eighth Circuit affirmed summary judgment, but on different grounds than the district court. Pet. App. 14-20. Gagnon now asks this Court to review the Eighth Circuit's decision on his USERRA claims; however, in doing so, Gagnon has materially misstated the record. Sprint has highlighted these misstatements below, and set out an accurate synopsis of the pertinent facts and legal rulings.

I. Gagnon's Misstatement of the Record

Gagnon has misstated the record below in three material respects. First, Gagnon asks the Court to review a *summary judgment* ruling on his USERRA discrimination claims solely on the basis of the *trial record* in this case. Second, Gagnon has misrepresented the USERRA discrimination claim at issue before the lower courts. Third, Gagnon has exaggerated portions of the Eighth Circuit's ruling on his USERRA claims.

A. Gagnon's Misrepresentation of the Summary Judgment Record

In an effort to bolster his USERRA claims, Gagnon has ignored the record upon which the lower courts' based their decisions. The district court dismissed Gagnon's USERRA discrimination and retaliation claims upon cross motions for summary judgment. The Eighth Circuit affirmed that decision, albeit on different grounds. Gagnon's

---

what it takes to trigger the "mixed motive" rubric, and is the subject of Sprint's Petition for Writ of Certiorari now pending with the Court.

USERRA claims never reached trial. Nevertheless, Gagnon's Petition relies *entirely* on the trial record from Gagnon's Title VII trial. Gagnon's strategic decision to ignore the summary judgment record is significant. Not only were the substantive legal claims at the summary judgment stage different than the trial stage, the "evidence" in the trial record was vastly different than the summary judgment record because the USERRA claims were not litigated at trial.

For example, Gagnon represents to the Court as a statement of fact in support of his USERRA claims that he "applied for approximately twenty different positions within Sprint and was not hired." *See* Petition, at p. 7. Gagnon did not proffer "evidence" of a single one of these jobs at the summary judgment stage. In fact, Gagnon's efforts to admit this evidence at trial was *rejected* by the district court, which recognized that Gagnon's repeated job applications were nothing more than Gagnon's litigation strategy to bolster his Title VII claims. Pet. App. 131. Gagnon did not preserve this ruling for appeal. Not only is Gagnon asking the Court to review a summary judgment ruling based upon the trial record, he is asking the Court to do so based on "evidence" excluded at trial.

As another example, Gagnon places great reliance on – and in fact recites the entire content of – an October 1997 e-mail addressing the diversity of skills and backgrounds of employees. *See* Petition, at p. 5. Gagnon argues that this e-mail somehow demonstrates USERRA discrimination against *him*. What Gagnon has failed to tell the Court is that the summary judgment record demonstrated that: (1) the author of the e-mail had no role in Gagnon's employment (which predated the e-mail by 7 months); (2) the author had no decision-making authority; and (3) Sprint hired both

candidates discussed in the e-mail. Respondents' Appendix Resp. App. 2a-3a.[2]

The district court and Eighth Circuit resolved Gagnon's USERRA claims on the basis of the summary judgment record, not the incomplete Title VII trial record recited in Gagnon's Petition. Gagnon's statement of the record is patently unreliable, and does not provide the Court with a factual foundation to assess the underpinnings of the lower courts' rulings.

B. Gagnon's Misrepresentation of His USERRA Discrimination Claim

Gagnon retired from the United States Army on January 31, 1997. Sprint hired Gagnon in April of 1997 as a curriculum developer, and paid him a base salary of $44,100 per year. As the basis for his USERRA discrimination claim before both the district court and Eighth Circuit, Gagnon claimed that Sprint paid him $1000 less than other curriculum developers because of his status as a military veteran. That was the sole USERRA discrimination claim presented to the courts below. Pet. App. 5, 15, 25, 29.[3]

In October 1997, Sprint promoted Gagnon to CBT (computer based training) manager, and awarded him a raise within company policy. Dissatisfied with his raise, Gagnon

---

[2] The affidavits of Kathleen Wilder and Jim Keenan (cited *infra*) contained in Respondents' Appendix were part of the summary judgment record, and the facts from their affidavits cited in this brief were undisputed.

[3] The factual backdrop for this claim is discussed below. *See* Section II.

claimed that his raise upon promotion was the product of race and gender discrimination in violation of Title VII. This was one of the claims at issue in Gagnon's Title VII trial. Gagnon never claimed to the lower courts that his October 1997 raise constituted USERRA discrimination; consequently, the lower courts never addressed such a claim.

Apparently, Gagnon is now representing to this Court that his USERRA claim centered on the *October 1997* promotion / pay raise that Gagnon challenged in his Title VII trial. *See* Petition, at pp. 4-5, 16 n.2. As the Court can plainly see from the lower courts' decisions, Gagnon never made such a claim (or argument) in the summary judgment record.[4]

C. Gagnon's Misrepresentation of the Eighth Circuit's USERRA Ruling

At various points in his Petition, Gagnon suggests (without citation) that the Eighth Circuit found "direct evidence" of USERRA discrimination, and concluded that Sprint, in fact, discriminated against Gagnon because of his veteran status. *See* Petition, at p. 4, 8, 9, 16, 17. The Eighth Circuit never made such findings. In fact, the Eighth Circuit expressly ruled that it need not address the merits of Gagnon's

[4] To the extent that Gagnon is now trying to assert before this Court a new USERRA discrimination claim, the law is well settled that this Court will not consider a claim or argument that the Petitioner never raised in the courts below. *Ayer v. Robbins*, 519 U.S. 452, 464 (1997)(citation omitted).

USERRA discrimination allegations, because his claim was not covered by USERRA. Pet. App. 15-16.[5] The Eighth Circuit's ruling hardly constitutes a finding of discrimination.

II. Background of Gagnon's USERRA Claims

In his sole USERRA discrimination claim, Gagnon alleged that when he started his Sprint employment, Sprint hired him for $1000 less than Sprint paid other curriculum developers because of his veteran status. Pet. App. 5, 15, 25, 29. Gagnon's claim was both legally and factually infirm.

Sprint hired Gagnon as a curriculum developer in April 1997 at a base salary of $44,100 per year. Gagnon was the first veteran hired in his business unit. As a matter of undisputed fact, Sprint paid Gagnon as much as, and in some cases more than other curriculum developers. Resp. App. 2a, 5a-7a. Gagnon (military veteran), Jill Uland (non-military), and Ken Brantingham (non-military) started at $44,100. Joy Gish (non-military) started at $42,000. Stephen Elkins (non-military) started at $38,000. *Id.*

Given the objective facts regarding what Sprint paid its curriculum developers, why did Gagnon allege USERRA discrimination? More than a year after Gagnon was hired, Kathleen Wilder, his then supervisor, wrote a memo stating that Gagnon "was brought in about $1,000 less than his peers, based upon the lack of business experience." She wrote this without checking Gagnon's starting pay versus the pay of other curriculum developers, and submitted an affidavit in the summary judgment record acknowledging her mistake. Resp. App. 1a-2a. As demonstrated by the actual salaries of

[5] Sprint has quoted the pertinent holding of the Eighth Circuit below.

Gagnon and his peers, Wilder's memo was simply and objectively incorrect.

The summary judgment record further established that Wilder, the person whom Gagnon claimed discriminated against military veterans:

> •approved Gagnon's hiring with full knowledge of his veteran status;
>
> •supported Gagnon for the CBT manager position; and
>
> •approved the hiring of at least thirteen other military veterans in the same department as Gagnon during the same time period that she allegedly harbored an anti-veteran animus.

In summary, Gagnon twisted a mistaken comment by Wilder a year after he was hired into a discrimination lawsuit over an act that he knew never even occurred.

Gagnon's USERRA retaliation claim focused on a "written reminder" (a disciplinary memo) that Wilder issued to him in August 1998. Gagnon claimed that Wilder gave him the "written reminder" in retaliation for Gagnon's internal allegations to Sprint management that he was discriminated against because of his veteran status. The summary judgment record demonstrated otherwise.

In August 1998, Gagnon and Lynn Meredith-Ball, another manager in Gagnon's department, called a meeting with four subordinate employees outside of the Sprint workplace. Pet. App. 4-5, 29. Gagnon and Meredith-Ball told these employees, all of whom were military veterans, that

Wilder was uncomfortable with the number of veterans in her department, and would not promote anyone with a military background.[6] *Id.* Gagnon and Meredith-Ball further counseled these employees about job opportunities outside of Wilder's department. *Id.* After at least one of the employees complained about this meeting, Wilder fully investigated the matter. Each of the four employees whom Gagnon pulled out of the workplace provided statements as to what happened. As a result of the statements from the employees involved in the meeting, Wilder issued a "written reminder" to Gagnon and Meredith-Ball for their poor managerial judgment. *Id.* The only effect of the "written reminder" was that Gagnon and Meredith-Ball needed vice presidential approval before seeking promotions or transfers for a period of six months. *Id.*

In short, Gagnon received a "written reminder" because of the August 1998 incident, not because of prior complaints of military discrimination.

III. Disposition of Gagnon's USERRA Claims by the Lower Courts

The district court entered summary judgment on Gagnon's USERRA discrimination claim, finding that even if Sprint had paid Gagnon $1000 less than other curriculum developers, Sprint did not violate USERRA by making a pay decision based upon employees' relative experience and qualifications. Pet. App. 31-38. The district court further rejected Gagnon's USERRA retaliation claim, holding that purely internal complaints of veteran discrimination do not

[6] Gagnon said this despite the fact that Wilder supported his promotion less than a year earlier.

constitute "protected activity" under USERRA. Pet. App. 38-42.

The Eighth Circuit affirmed the district court's rulings, but on different grounds. With respect to Gagnon's USERRA discrimination claim, the Eighth Circuit concluded that it need not address the merits of Gagnon's allegations. Pet. App. 15-16. Based on the plain language of USERRA, the court held:

> In Gagnon's claim of discrimination under the USERRA, he asserts that because of his military background, he received a lower starting salary. The district court held that because Sprint PCS provided evidence of a factor other than Gagnon's military service to explain the disparity in his initial pay, Sprint PCS's motion for summary judgment was warranted. However, our inquiry does not carry us that far into the analysis. We find Gagnon fails to state a claim of discrimination under the USERRA. Gagnon has not been denied "initial employment, reemployment, retention in employment [or] promotion," as covered under section 4311(a). Thus, his only basis for a claim of discrimination under section 4311(a) is that Sprint PCS denied him a benefit of employment due to his prior service membership. Gagnon claims he was paid $1,000 less than his peers at Sprint PCS. The term "benefit," as defined by the USERRA, specifically excludes wages or salary for work performed. 38 U.S.C. § 4303(2).

> Thus, Gagnon has no basis for maintaining his claim of discrimination under the USERRA.

Id.

With respect to Gagnon's USERRA retaliation claim, the Eighth Circuit held that Gagnon did engage in "protected activity" under USERRA. The court nevertheless affirmed summary judgment, because Gagnon failed to present evidence that his internal complaints played any causal role in the issuance of the "written reminder." Pet. App. 16-20.

REASONS WHY THE WRIT SHOULD BE DENIED

Through his misstatements of the record, Gagnon has not provided an adequate foundation for the Court to properly assess the issues he challenges. For this reason alone, the Court should reject Gagnon's Petition. Notwithstanding Gagnon's confusion of the record, the issues Gagnon requests this Court to review do not warrant the rare invocation of the Court's judicial review power.

I. The Eighth Circuit's Decision Does Not Present a Conflict Between the Circuits on an Important Issue of Federal Law

A. USERRA Discrimination Claim

The Eighth Circuit's decision represents the first ruling by any court regarding whether USERRA's definition of "benefit" excludes "wages or salary for work performed" from its coverage. As the first and only ruling on this issue, this decision can hardly conflict with the decisions of any other court, state or federal, or with any decisions of this Court. *See* Sup. Ct. Rule 10; *Braxton v. United States*, 500

U.S. 344, 347 (1991)("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."). Indeed, Gagnon does not claim such a conflict. Moreover, because this is the only case since USERRA's inception addressing this narrow issue, this case does not present a dispute among the courts on an important issue of federal law "that has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c).

The Eighth Circuit merely applied Congress' plain language in the text of USERRA to the particular allegations of this case; narrow allegations the likes of which have not catalyzed a single other similar court decision in the history of USERRA. The USERRA discrimination issue raised by Gagnon – even if the Eighth Circuit had decided it incorrectly – does not warrant invocation of the Court's certiorari power.

B. USERRA Retaliation Claim

Again, Gagnon does not raise a conflict among the courts regarding USERRA's retaliation provision, as no conflict exists. The Eighth Circuit correctly ruled that Gagnon provided no evidence in the summary judgment record that his internal complaints played a causal role in the issuance of the August 1998 "written reminder." Gagnon concedes that the Court properly stated the legal standards of a USERRA retaliation claim. In essence, Gagnon is asking this Court to review the summary judgment record (which Gagnon did not even provide) to second-guess the Eighth Circuit's application of facts to a properly stated rule of law. This is not a proper ground for a writ of certiorari. *See* Sup. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual

findings or the misapplication of a properly stated rule of law.").

As this Court has long held, it "do[es] not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), for its "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 (1981)(Stevens, J., concurring). *See also Ponte v. Real*, 471 U.S. 491, 501-02 (1985)(Stevens, J., concurring)("The merits of an isolated case have only an oblique relevance to the question whether a grant of certiorari is consistent with the sound administration of this Court's discretionary docket."). Gagnon's Petition on the retaliation issue fundamentally misapprehends the role of this Court, and should be summarily rejected.[7]

II. The Eighth Circuit's Decision on Gagnon's USERRA Discrimination Claim was Correct

In his USERRA discrimination claim, Gagnon alleged that Sprint: (1) paid him $1,000 less in salary than other curriculum developers when he started at Sprint; and (2) thereby denied him a "benefit" of employment, as that term is defined by USERRA. As an initial matter, Gagnon's claim is and always has been a red herring that fails under any analysis. The summary judgment record demonstrated, as a matter of undisputed and objective fact, that Gagnon was paid

[7] Because there is nothing unique about the Eighth Circuit's ruling to distinguish it from the hundreds, if not thousands, of opinions affirming summary judgment in retaliation cases due to a lack of causation evidence, Sprint is not further addressing this issue in this brief.

the same as or more than other curriculum developers when he started his job at Sprint. Notwithstanding this dispositive factual vacuum, the Eighth Circuit correctly interpreted USERRA.

A. USERRA's Plain Language Controls and Supports the Eighth Circuit's Decision

The plain language of USERRA defines "benefit, "benefit of employment," or "rights and benefits" as "any advantage, profit, privilege, gain, status, account, or interest ***(other than wages or salary for work performed)***" arising out of the employment relationship. 38 U.S.C. § 4303(2)(emphasis added). With the parenthetical, Congress plainly and unambiguously excluded wages and salary for work from the definition of "benefit."

Congress' exclusion of wages from the definition of "benefit" makes perfect sense. Had Congress included wages in the definition of "benefit," employers (and invariably, courts) would be required to make confusing value judgments translating a veteran's military experience into wage values in the private sector. There is nothing in USERRA's text or legislative history indicating that Congress intended for USERRA to have such far reaching, absurd consequences.

Despite USERRA's clear definition of "benefit," Gagnon contends that Congress actually meant to say in the parenthetical emphasized above, "other than wages or salary for work ***not*** performed." In other words, Gagnon argues that Congress intended to say something that is 180 degrees the opposite of what it actually said. Gagnon's request to the Court to rewrite the text of USERRA based upon inconsistent statements of legislative purpose misapprehends the Court's role in interpreting statutes.

"When interpreting a statute, [the Court] look[s] first and foremost to its text." *U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994). Ordinarily, the Court will not indulge an argument based on "legislative purpose" unless the Court of Appeals relied upon such an argument in its decision. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 81 (1995). Of course, the Eighth Circuit did not do so here. The Eighth Circuit properly applied USERRA's plain language to Gagnon's allegations, and correctly affirmed summary judgment on Gagnon's USERRA discrimination claim.

B. The Totality of USERRA's Legislative History Supports the Eighth Circuit's Decision

Not only does Gagnon ignore USERRA's plain language, his legislative purpose argument is misguided. While the current version of USERRA became law in 1994, Congress' discussion over the provisions of USERRA commenced several years before. During the 102nd Congress in 1991, both the House and Senate developed the foundation for the current form of USERRA, including the definition of "benefit" at issue here. The House Report accompanying the 1991 House Bill contained the following definition:

> The term "benefit," or ""benefit of employment" means any aspect of the employment relationship, ***other than wages or salary for work performed***, provided by contract or employer practice or custom, that offers advantage, profit, privilege, gain, status, account, or interest and includes, but is not limited to, pension plans and payments, insurance coverage and awards, employee

> stock ownership plans, bonuses, severance pay, supplemental unemployment benefits, vacations, and selection of work hours or locations of employment.

H.R. Rep. 102-56, 102nd Cong. (May 9, 1991), 1991 WL 243411, at * 43 (emphasis added). The sectional analysis of this definition contained in the House Report accompanying the House Bill states that "benefit" was defined "broadly to include all attributes of the employment relationship provided by contract or employer custom and practice, ***other than wages for work performed***." *Id.* at * 55 (emphasis added).

Similar to the House Report, the Senate Report on the proposed USERRA in 1991 contains the following definition:

> The term "benefit," or ""benefit of employment" means any advantage, profit, privilege, gain, status, account, or interest that accrues by reason of an employment contract or an employer practice or custom ***(other than wages or salary for work performed)*** and includes rights under a pension or health plan, insurance coverage and awards, rights under an employee stock ownership plan, bonuses, severance pay, any supplemental unemployment benefit, an entitlement to leave with or without pay, work hours, and the location of employment.

S. Rep. 102-203, 102nd Cong. (Nov. 7, 1991), 1991 WL 243411 (emphasis added). In the discussion of this definition, the Senate Report states: "[The definition] would define 'benefit' or 'benefit of employment' as any advantage, profit, privilege, gain, status, account, or interest that accrues

by reason of an employment contract or an employer practice or custom ***(other than wages or salary for work performed)*** and include [sic] by way illustration the various attributes of the employment relationship that might be affected by an absence from employment." *Id.* (emphasis added).

The 102nd Congress did not pass USERRA, leaving it virtually complete and ripe for passage for the 103rd Congress. In 1993, the House and Senate each proposed bills to bring about the current version of USERRA – H.R. 995 and S. 843. The House Bill (and the corresponding House Report) that included the definition of "benefit" at issue here was passed in lieu of the Senate Bill. *See* Exhibit 3, U.S. Code Cong. and Admin. News Vol. 9, at p. 2449 (Dec. 1994). In line with the legislative history from both the House and Senate in 1991, the 1993 House Report excluded "wages or salary for work performed" from the definition at issue. *See* H.R. Rep. 103-65, 103rd Cong. (April 28, 1993), 1993 WL 235763, at * 2, 72-73.

The 1993 Senate Report accompanying Senate Bill 843 (not passed into law) contained a discussion of the proposed definitions for USERRA. This is the same discussion that Gagnon has highlighted to the Court in his Petition. In the discussion, the Report states: "New section 4303(2) would define 'benefit' or 'benefit of employment,' or 'rights and benefits' as any advantage, profit, privilege, gain, status, account, or interest ***(other than wages or salary for work <u>not</u> performed while absent from employment)*** . . ." *See* S. Rep. 103-158, 103rd Cong. (Oct. 18, 1993), 1993 WL 432576, at * 41 (emphasis added). This is the first and only reference in USERRA's legislative history dating back to 1991 intimating that the wage exclusion from the "benefit" definition is limited to wages for work *not* performed, as Gagnon suggests the law should be interpreted.

In summary, all of USERRA's legislative history from both the House and Senate dating back to 1991 corroborates the exclusion of wages for work performed from the definition of "benefit," except for one discussion in a Senate Report accompanying a Senate Bill that was not passed into law. The Eighth Circuit correctly refused to supplant USERRA's plain language and substantial legislative history with this single isolated comment.

C. USERRA's Remedial Scheme Does Not Conflict With the Eighth Circuit's Correct Interpretation of the Definition of "Benefit"

Gagnon points to USERRA's remedial scheme and its legislative history in arguing that USERRA expressly provides for lost wages as a remedy. Sprint agrees with Gagnon that USERRA's remedial scheme provides for lost wages in appropriate cases. However, Sprint does not agree with Gagnon's leap of logic that because USERRA provides for lost wage damages, the definition of "benefit" must necessarily include wages.

USERRA provides that a protected employee shall not be denied (1) initial employment; (2) reemployment; (3) retention in employment; or (4) any benefit of employment. 38 U.S.C. § 4311(a). Given this, USERRA's *exclusion* of wages and salary from the definition of "benefit" is perfectly consistent with USERRA's *inclusion* of lost wages in its remedial scheme. For example, if an employer violates category (1) by denying a military applicant initial employment, that person may very well suffer lost wage damages. If an employer violates category (2) by not reemploying a military employee, that person may very well suffer lost wage damages. If an employer fires a military employee in violation of category (3), that person may very

well suffer lost wage damages. Accordingly, Congress' exclusion of wages from the definition of "benefit" does not render the lost wage portion of its remedial scheme superfluous, as Gagnon suggests.

CONCLUSION

In light of Gagnon's failure to provide the necessary backdrop for the Court's certiorari consideration, the failure to raise a single issue warranting the Court's certiorari jurisdiction, and the propriety of the Eighth Circuit's rulings on the USERRA issues, Sprint requests that the Court deny Gagnon's Petition.

Respectfully submitted,

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Counsel for Respondents

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 99-0683-CV-W-1

WILLIAM E. GAGNON, Plaintiff,

v.

SPRINT CORPORATION, et al., Defendants.

AFFIDAVIT OF KATHLEEN WILDER

Kathleen Wilder, of lawful age, and upon her oath having been duly sworn, does testify as follows:

1. My name is Kathleen Wilder. I am making this affidavit in my capacity as a Director of Sprint PCS and upon my personal knowledge.

2. Attached to this affidavit as Exhibit "A" is a copy of Deposition Exhibit 4. This is a document which I prepared at the request of either the Human Resources Department or Ellen Martin of the Sprint PCS legal staff, to provide a narrative response to the allegations raised by Bill Gagnon in his initial charge of employment discrimination. As

best as I can recall, this document would have been drafted by me in the late May or early June, 1998 time frame, more than one year after Bill Gagnon was hired at Sprint.

3. This document was based upon my recollection of events that had occurred. It is my recollection that my files on Mr. Gagnon had already been forwarded to Ms. Martin by the time I prepared this document, so I did not have a chance to review them.

4. Mr. Gagnon was hired by Jim Keenan with my approval as Director. Mr. Keenan would have made a salary recommendation for Mr. Gagnon in conjunction with the Sprint PCS compensation group, and I would have approved that salary. Barbara Glover, who is discussed below, had no involvement in making the decision as to what Mr. Gagnon's compensation would be.

5. Having reviewed the salary information for those persons hired Curriculum Developers prior to Mr. Gagnon, and the Salary Worksheet for Mr. Gagnon (a copy of which as attached to this affidavit as Exhibit "B"), it is my belief that my comments in Deposition Exhibit 4 about Gagnon being paid less than his peers were inaccurate because Mr. Gagnon's salary was greater than that of Joy Gish and Stephen Elkins, who were also hired by Mr. Keenan, and the same as the starting salaries paid to Patricia Plumb, Jill Uland and Ken Brantingham, who were hired by Larry Snyder.

6. I have attached to my affidavit as Exhibit "C" a copy of an e-mail from Barbara Glover about some interviews that she did in October of 1997, The two individuals that Ms. Glover interviewed for my department

were Dale Coffman and Jerry Simonsen. Ms. Glover did not have authority to decide whether or not these individuals would be hired.

7. Both Dale Coffman and Jerry Simonsen had prior military experience before applying for jobs at Sprint PCS, and both were hired. In fact, Dale Coffman was hired in a managerial capacity.

8. Employees at Sprint PCS attend new-hire training, are provided with the Human Resource manual with Sprint PCS' EEO Statement, which contains contact information, and are required to complete the Sprint Principles of Business Conduct training, which also includes information about appropriate workplace conduct, and provides information on how to report inappropriate conduct, including an anonymous Helpline. In addition, management employees, such as Mr. Gagnon, complete a Human Resources Management class, which deals, in part, with how to handle alleged discrimination in the workplace.

This concludes my affidavit.

/s/_____
Kathleen Wilder

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

On this 16th day of October, 2000, before me personally appeared, to me known to be the person described in and who executed the foregoing affidavit, and

acknowledged that she executed the same as her free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year above written.

/s/_____
Notary Public

My Commission Expires:

"NOTARY SEAL"
Heather K. McNeely, Notary Public
Jackson County, State of Missouri
My Commission Expires 6/2/2001

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 99-0683-CV-W-1

WILLIAM E. GAGNON, Plaintiff,

v.

SPRINT CORPORATION, et al., Defendants.

AFFIDAVIT OF JIM KEENAN

Jim Keenan, of lawful age, and upon his oath having been duly sworn, does testify and aver as follows:

1. My name is James ('Jim') P. Keenan. I make this Affidavit in my capacity as a Manager of Sprint PCS and based upon my own knowledge and/or my review of the business records of Sprint PCS.

2. I was initially employed by Sprint PCS on November 5, 1996 as one of the original managers in the Training and Performance Support ('TAPS') Department under the direction of Kathleen Wilder.

3. At the time of my initial hire, I was the Manager over Systems Curriculum, and in that position, I was responsible for hiring the curriculum developers in my group. When the individuals were being hired for my group, I was the one who, in conjunction with the Human Resources Department, established starting wages for these employees.

4. Attached to my Affidavit is a copy of Deposition Exhibit 127, which is a salary worksheet and approval sheet which I prepared in connection with the employment of William E. Gagnon, Jr., and the recommendation for his salary. In making my recommendation, I considered fifteen years of Mr. Gagnon's experience in the military and outside the military to be related to the work in which he would be performing for Sprint PCS, and I gave him full credit for his Masters of Science Degree in Adult, Occupational and Continuing Education, even though that degree had not been awarded at the time of Mr. Gagnon's initial employment.

5. In determining the base compensation, the peers that were utilized in determining Mr. Gagnon's compensation were Joy Gish and Stephen Elkins, two individuals hired before Mr. Gagnon. Ms. Gish's salary was $42,000 and Mr. Elkins' was $38,000. The salary which I recommended for Mr. Gagnon, $44,100, was approved by the Compensation Group, Ms. Wilder and James Mendenhall, our Vice-President.

6. None of the other curriculum developers hired by Larry Snyder before Mr. Gagnon was hired by me was paid higher salary than was Mr. Gagnon. Of this group, the only former member of the military was Bill Gagnon. The

starting salary for these individuals are as follows:

William Gagnon, Jr.	$44,100
Jill Uland	$44,100
Ken Brantingham	$44,100
Stephen Elkins	$38,000
Joy Gish	$42,000

7. At the time I recommended Mr. Gagnon's starting salary of $44,100, I considered his military service to be an asset, not a liability, to his compensation. His prior military service did not result in a salary being established at $1,000 lower than that of his peers as is demonstrated by the paragraph above.

8. The salary recommendation I made for Mr. Gagnon, as reviewed by the Compensation Group at Sprint PCS, was approved without change or comment by Kathleen Wilder. I do not recall anyone in the compensation process making any comment about Mr Gagnon's military experience being a negative factor in his compensation.

This concludes my affidavit.

/s/_____
James Keenan

STATE OF)
) SS
COUNTY OF)

On this 12th day of October, 2000, before me personally appeared James Keenan, to me known to be the

person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year above written.

/s/_____
Notary Public

My Commission Expires:

Lori A. Fischer
Jackson County
My Commission Expires
January 22, 2002